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In the Supreme Court of the United States

OCTOBER TERM, 1982

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY and
NATIONAL TREASURY EMPLOYEES UNION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. V) 7131(a), requires that a federal agency pay a per diem allowance and travel expenses to employee union representatives engaged in collective bargaining with the agency.

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v.

FEDERAL LABOR RELATIONS AUTHORITY and
NATIONAL TREASURY EMPLOYEES UNION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Bureau of Alcohol, Tobacco and Firearms, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-11a) is reported at 672 F.2d 732. The ruling of the Federal Labor Relations Authority (App. D, *infra*, 15a-34a) is reported at 4 F.L.R.A. No. 40.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1982 (App. B, *infra*, 12a-13a), and a timely petition for rehearing was denied on July 13,

1982 (App. C, *infra*, 14a). On October 1, 1982, Justice Rehnquist extended the time in which to file a petition for certiorari to and including November 10, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

5 U.S.C. (Supp. V) 7131 provides:

> (a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.
>
> (b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status.
>
> (c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.
>
> (d) Except as provided in the preceding subsections of this section—
>
> > (1) any employee representing an exclusive representative, or
> >
> > (2) in connection with any other matter covered by this chapter, any employee in an

appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

5 U.S.C. (Supp. V) 5702(a) provides:

Under regulations prescribed under section 5707 of this title, an employee while traveling on official business away from his designated post of duty, or in the case of an individual described under section 5703 of this title, his home or regular place of business, is entitled to (1) a per diem allowance for travel inside the continental United States at a rate not to exceed $50, and (2) a per diem allowance for travel outside the continental United States, that may not exceed the rate established by the President, or his designee, for each locality where travel is to be performed. For travel consuming less than a full day, such rate may be allocated proportionately.

5 U.S.C. 5707(a) provides:

The Administrator of General Services shall prescribe regulations necessary for the administration of this subchapter, except that the Director of the Administrative Office of the United States Courts shall prescribe such regulations with respect to official travel by employees of the judicial branch of the Government.

STATEMENT

1. In October 1978 Congress enacted the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 ("the Act"). Title VII of the Act (5 U.S.C. (Supp. V) 7101 *et seq.*) governs labor-management relations, including collective bargaining, for nearly

all federal agencies.[1] Title VII replaced the federal labor relations program created in 1962 by Executive Order No. 10988, 27 Fed. Reg. 551.[2]

The Act establishes the Federal Labor Relations Authority ("FLRA" or "Authority") as a three-member independent body within the Executive Branch with responsibility for supervising the federal collective bargaining process under Title VII.[3] FLRA activi-

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[1] Certain federal employees, including members of the uniformed services and the Foreign Service, and certain agencies, including the General Accounting Office, Federal Bureau of Investigation, Central Intelligence Agency, and National Security Agency, are excluded from the coverage of Title VII. See 5 U.S.C. (Supp. V) 7103(a)(2) and (3). United States Postal Service employees also are excluded from Title VII coverage, since labor relations matters involving those employees are within the jurisdiction of the National Labor Relations Board. See 39 U.S.C. 1209.

Title VII protects the right of federal employees "to form, join, or assist any labor organization, or to refrain from any such activity" (5 U.S.C. (Supp. V) 7102), and it establishes a duty to bargain collectively in good faith. See 5 U.S.C. (Supp. V) 7116(a)(5) and (b)(5). The statute also outlines the matters subject to the bargaining obligation. See 5 U.S.C. (Supp. V) 7103(12), (14) and 7117. Certain management rights are excluded from the scope of bargaining. 5 U.S.C. (Supp. V) 7106. However, an agency must negotiate with a recognized union over procedures the agency will follow in exercising its reserved management rights. 5 U.S.C. (Supp. V) 7106(b)(2). The provisions of Title VII are to be read "in a manner consistent with the requirement of an effective and efficient Government." 5 U.S.C. (Supp. V) 7101(b).

[2] The executive order program was revised and continued by Executive Order No. 11491, 34 Fed. Reg. 17605 (1969), as amended by Executive Orders Nos. 11616, 11636, and 11838, 36 Fed. Reg. 17319, 24901 (1971) and 40 Fed. Reg. 5743 (1975).

[3] The FLRA replaced the Federal Labor Relations Council, which had similar responsibilities under the executive order program.

ties include adjudication of negotiability disputes, unfair labor practice complaints, bargaining unit issues, and arbitration exceptions, conduct of elections, and rulemaking. See 5 U.S.C. (Supp. V) 7105(a)(2)(A)-(I). The FLRA has the authority to issue orders against unfair labor practices (5 U.S.C. (Supp. V) 7118) and to seek enforcement of those orders in appropriate United States courts of appeals. 5 U.S.C. (Supp. V) 7123(b). Persons, including federal agencies, who are aggrieved by any final FLRA order may seek judicial review in the courts of appeals. 5 U.S.C. (Supp. V) 7123(a).

2. In November 1978 petitioner, the Bureau of Alcohol, Tobacco and Firearms of the Department of the Treasury, notified the National Treasury Employees Union ("the Union") that it intended to move its Lodi, California, office to Sacramento, and to establish a reduced duty post at a new location in Lodi (App. A, *infra*, 2a). The Union, which represented some of the Bureau's employees affected by the relocation, informed the Bureau that it wished to negotiate concerning the move and its impact on employees in the bargaining unit (App. D, *infra*, 22a). The Union designated as its bargaining agent for these negotiations Donald Pruett, a Bureau employee who lived in Madera, California, and was stationed in Fresno (App. A, *infra*, 2a). Pruett notified the Bureau that he wished to inspect the new Bureau facilities (Keehan deposition of March 7, 1980, at 11).[4] Bureau officials agreed to meet at the proposed Sacramento office and to examine the facilities there and in Lodi (App. A, *infra*, 2a).

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[4] The deposition of Mardell Keehan, a Bureau personnel specialist, is part of the record in this case (Tr. 8-11, 68-69). "Tr." refers to the transcript of the February 27, 1980, hearing before the FLRA Administrative Law Judge.

On the morning of February 23, 1979, several Bureau officials met Pruett in Sacramento and toured the offices. They inspected the physical facilities and the location of the desks, as well as the availability of restrooms, a cafeteria, and parking (Tr. 28-29, 54-56). Pruett "wandered around" by himself for a time, examining the building and offices (*id.* at 28-29). The parties then drove to Lodi and, after lunch, toured the new reduced office site, examining the proposed arrangement of desks, parking, and access to restaurants (*id.* at 57-66). Pruett and the Bureau officials then went to the existing Lodi office where they discussed the impact of the planned move (App. A, *infra*, 2a). Pruett pronounced the new facilities acceptable, except for parking availability in Sacramento (App. D, *infra*, 24a-25a). The parties discussed assignment of employees to the two new offices and the possibility of excusing employee tardiness for the first week in Sacramento (*id.* at 25a). On the day of negotiations Pruett left his home in Madera around 6:15 a.m. and returned at approximately 5:45 p.m., traveling a total of some 300 miles in his own car (*ibid.*; Tr. 36, 37).

Pruett sought to have the February 23 session classified as a quarterly meeting for which "official time" was authorized in the collective bargaining agreement between the Union and the Bureau (App. A, *infra*, 3a). A grant of "official time" allowed employee union representatives to be paid as if they were at work, without being charged for annual leave. The Bureau refused Pruett's request on the ground that the agreement did not authorize official time for mid-term negotiations, as opposed to the quarterly meetings (*ibid.*; App. D, *infra*, 23a).[5] The Bureau informed Pruett

[5] The agreement also made no reference to payment of a per diem allowance or travel expenses of employee union representatives engaged in collective bargaining (C.A. App. 136).

that he could take either annual leave or leave without pay for the day he had been away from his post (App. A, *infra*, 3a).

3. In June 1979, several months after the Bureau's decision not to authorize official time for Pruett, the Union filed an unfair labor practice charge with the FLRA. The Authority's General Counsel issued a complaint charging that Pruett was entitled to official time for his day of touring and negotiating under 5 U.S.C. (Supp. V) 7131(a), which governs authorization of official time for employee union representatives engaged in negotiation of a collective bargaining agreement (App. D, *infra*, 27a). In the course of a hearing before an Administrative Law Judge, the complaint was amended to add a claim that, in addition to paying his salary, the Bureau should have paid Pruett's travel expenses and a per diem allowance (App. A, *infra*, 3a).

In December 1979, shortly before the General Counsel filed this complaint against the Bureau, the FLRA had issued an Interpretation and Guidance concerning official time and travel expenses and per diem (2 F.L.R.A. No. 31; App. E, *infra*, 35a-47a).[6] In its Interpretation, the Authority first concluded that under Section 7131(a) federal agencies must grant official time to employee union representatives for all types of collective bargaining, including mid-term negotiations (App. E, *infra*, 37a-41a). The Authority then found that, although Section 7131(a) nowhere men-

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[6] Although the Authority provided a notice and comment period, the Interpretation apparently was issued not under the Authority's statutory power to promulgate regulations (5 U.S.C. (Supp. V) 7134), but rather under 5 U.S.C. (Supp. V) 7105(a)(1), which requires the Authority to provide leadership in establishing policies and guidance relating to federal labor-management relations (App. A, *infra*, 4a).

tions travel expenses or per diem allowances, that section nonetheless requires federal agencies to pay such costs for all employee union representatives for whom official time is granted for collective bargaining activities (App. E, *infra*, 41a-45a).

Following the hearing, the Administrative Law Judge found that negotiations had indeed taken place between Pruett and Bureau officials on February 23, 1979 (App. D, *infra*, 30a-31a). The ALJ stated that he considered himself constrained to follow the Authority's recent Interpretation and Guidance (*id.* at 28a-29a). He accordingly recommended that the Bureau be ordered to grant Pruett official time for the day of negotiations and to pay his travel costs and per diem and that it be required to post a notice stating that the Bureau would do the same for employee union representatives in future negotiations (*id.* at 32a-33a). The Bureau timely filed exceptions to the ALJ's decision with the Authority. In September 1980 the Authority affirmed and adopted the decision of the ALJ and ordered the recommended relief (*id.* at 15a-19a). The Bureau then sought review in the court of appeals pursuant to 5 U.S.C. (Supp. V) 7123(a), and the Union intervened as a party in that appeal.

4. On appeal, the Bureau raised two issues: (1) whether Section 7131(a) requires agencies to grant official time to employee union representatives for mid-term negotiations; and (2) assuming that official time is required, whether Section 7131(a) also requires payment of travel expenses and per diem of employee union representatives. The court of appeals enforced the Authority's order on both issues (App. A, *infra*, 1a-11a).

The court first held that it must give deference to the Authority's Interpretation and Guidance if it was

reasoned and supportable (App. A, *infra*, 4a-5a). The court concluded that the Authority's decision regarding official time for mid-term bargaining was reasonable, citing the language of the statute and its history (*id.* at 5a-9a).[7] The court gave relatively little attention to the issue of travel costs and per diem. It recognized, as did the Authority, that neither the statute nor its history refers to such payments (*id.* at 9a). The court reviewed the three reasons offered by the Authority in its Interpretation and Guidance as support for the view that the statute nonetheless requires payment of travel expenses and per diem[8] and concluded that the Authority's interpretation appeared reasonable (*id.* at 9a-10a).

REASONS FOR GRANTING THE PETITION

This case presents an important and recurring question concerning administration of the federal labor

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[7] This aspect of the court's decision is not challenged in our petition.

[8] The court summarized (App. A, *infra*, 9a-10a) the three reasons set out in the Authority's Interpretation and Guidance. The Authority had cited the fact that the language of Section 7131(a) is similar to that of 5 U.S.C. (Supp. V) 7131(c), which the Authority previously had interpreted as requiring payment of union travel expenses and per diem. (Like Section 7131(a), Section 7131(c), which governs availability of official time for participation in proceedings before the Authority, does not mention travel expenses or per diem.) In addition, the Authority had concluded that employee union negotiators who were on official time while they were engaged in collective bargaining must be considered to be conducting "official business," so that they would be entitled to travel expenses and per diem under a separate statute, 5 U.S.C. (& Supp. V) 5702. Finally, the Authority had stated that payment of travel expenses and per diem would be consistent with a congressional intent to equalize the positions of management and labor.

relations program established under Title VII of the Civil Service Reform Act of 1978. The court of appeals' decision enforces an FLRA order requiring a federal agency to pay travel expenses and a per diem allowance to an employee union representative engaged in collective bargaining with that agency. This holding imposes on federal taxpayers, rather than union members, a significant monetary liability representing the ordinary and necessary expenses of operating a union, without the slightest indication in the statute or its history that Congress intended to create such liability. This result is incorrect and is in direct conflict with decisions of two other circuits. Review by this Court is plainly warranted.

1. The decision of the court of appeals conflicts with recent decisions of the Second and Eighth Circuits. See *Division of Military & Naval Affairs* v. *FLRA*, 683 F.2d 45 (1982), rehearing denied (2d Cir. Sept. 17, 1982); *Department of Agriculture* v. *FLRA*, No. 81-1948 (Aug. 9, 1982), rehearing denied (8th Cir. Sept. 14, 1982).[9] The Second and Eighth Circuits concluded that Title VII does not require a

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[9] We have supplied copies of the Eighth Circuit's slip opinion to the Clerk of the Court and to counsel for respondents. Other cases involving challenges by federal agencies to FLRA orders requiring the payment of travel expenses and per diem allowances are pending in the Eleventh and District of Columbia Circuits. See, e.g., *Florida National Guard* v. *FLRA*, No. 81-5466 (11th Cir. argued Sept. 1, 1982); *Bureau of the Mint and United States Customs Service* v. *FLRA*, Nos. 82-1194, 82-1195 (D.C. Cir.).

Given the wide geographical dispersion of federal offices, this issue could arise in every circuit. The Act provides for judicial review of FLRA orders "in the United States courts of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the

federal agency to pay the travel expenses and per diem allowances of employee union representatives engaged in collective bargaining with the agency. Both courts expressly noted and rejected the contrary conclusion of the Ninth Circuit in this case. See *Division of Military & Naval Affairs* v. *FLRA*, *supra*, 683 F.2d at 47 n.3; *Department of Agriculture* v. *FLRA*, *supra*, slip op. 16 n.19.

This conflict in the circuits creates severe practical problems for federal agencies, because it results in different rules governing employees within the same agency or even the same bargaining unit, depending upon the location of their duty stations. Pursuant to the decision below, Bureau employees serving as bargaining agents in Sacramento will receive travel payments and per diem allowances; under the decisions of the Second and Eighth Circuits, on the other hand, Bureau employees in New York or St. Louis will not receive such payments. This disparate treatment will be most noticeable during national negotiations. For example, if Bureau employees travel from Sacramento and New York to Washington, D.C. to attend the same nationwide bargaining session, the agency must determine which employee negotiators (if any) must receive travel expenses. A similar problem will arise if an employee stationed in a circuit with one rule travels to a bargaining session in a circuit with a different rule. This lack of uniformity creates substantial uncertainty about what rule applies in a particular case and places federal agencies in the awkward posture of affording different treatment to similarly

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District of Columbia." 5 U.S.C. (Supp. V) 7123(a). The term "person" includes a federal agency. 5 U.S.C. (Supp. V) 7103(a)(1).

situated employees. It may also result in artificial decisions about where negotiations will be held and which representatives will be chosen to attend.

The FLRA policy upheld by the court of appeals will spawn other adverse consequences. It will create unnecessary friction between unions and agencies by obliging agencies to monitor the travel of employee union representatives to ensure that such travel is reasonable.[10] Monitoring is likely to result in dissension if the agency concludes that union travel expenses are unreasonable.[11] Moreover, as agencies are increasingly subjected to budgetary constraints, they may be forced to choose between cutting travel expenses (including union travel) and reducing other agency activities, creating the potential for claims of discrimination against union activity.

The FLRA policy also seems likely to lead to inefficiencies in the collective bargaining process. The Authority's decision forces an agency to bear virtually

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[10] An agency may be required to monitor its employees' travel expenses in connection with investigations of such expenses by the Administrator of General Services. See 5 U.S.C. 5707(b).

[11] Indeed, an instance of such a problem already has surfaced before the FLRA. See *Department of the Air Force, Air Force Logistics Command, Wright-Patterson & AFGE, Council 214*, 10 F.L.R.A. No. 53 (Sept. 30, 1982). In that case a union filed an unfair labor practice charge with the Authority after the agency refused to pay travel expenses and per diem allowances for certain employee union negotiators who were to be brought from a distant location. The union had refused to explain why employee representatives stationed at the bargaining site could not be used for the negotiations, and as a result the agency was unable to certify that the travel demanded by the union was essential, as required by departmental travel regulations. The Authority found that the agency had committed an unfair labor practice.

the entire expense of collective bargaining: the agency must pay the salaries of both its own negotiators and those of the employee union representatives, as well as the travel expenses and per diem allowances of both groups. This places considerable pressure on the agency to compromise, while concurrently removing pressure from the union to do so. Thus, federal agencies will be at a distinct disadvantage if they are faced with protracted negotiations. Unlike the situation in the private sector, in which each party bears the costs incurred by its own representatives (see page 15, *infra*), the parties here will occupy unequal positions, thus undermining effective collective bargaining. This result seems clearly inconsistent with the congressional mandate that the statute should be interpreted "in a manner consistent with the requirement of an effective and efficient Government." 5 U.S.C. (Supp. V) 7101(b).

Finally, the FLRA policy will prove costly to federal taxpayers. The Office of Personnel Management has estimated that application of the FLRA Interpretation would cost 15 agencies over $2 million per year. See Gov't Empl. Rel. Rep. (BNA) No. 852, at 11 (Mar. 10, 1980).[12]

2. These consequences need not be suffered, because the decision of the court of appeals is incorrect.

a. The FLRA acknowledged in its Interpretation and Guidance that Title VII does not mention payments for travel expenses and per diem of employee union representatives (App. E, *infra*, 42a). Section 7131(a), on which the Authority relied, refers only

[12] Several months prior to the filing of this petition, the Office of Personnel Management surveyed selected government agencies and determined that travel expenses and per diem of employee union representatives of those agencies had totaled several million dollars over a 12-month period.

to authorization of official time for employee union representatives during the period they would otherwise be in a duty status.[13] Neither that section nor any other section of Title VII refers to payment of travel expenses or per diem. In addition, there is no discussion of travel expenses or per diem in the legislative history of the Act.

It is quite unlikely that Congress would have imposed a significant monetary obligation on the government by requiring that federal agencies pay travel expenses and per diem of employee union representatives without expressly referring to such a requirement. Under the executive order program that had previously governed federal labor relations, the established administrative practice was for each party to bear the expenses of its own representatives (App. E, *infra*, 42a n.6). In fact, payment by federal agencies of the expenses of employee union representatives engaged in collective bargaining appears to have been prohibited in most instances. See 46 Comp. Gen. 21 (1966). Congress must be presumed to have been aware of this practice (*Lorillard* v. *Pons*, 434 U.S. 575, 581 (1978)), but gave no indication that it intended to change it. The failure affirmatively to alter the settled administrative practice suggests that Congress intended to codify it. See *Haig* v. *Agee*, 453

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[13] Section 7131(a) reads:

> Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

U.S. 280, 300 (1981); *Lorillard* v. *Pons, supra*, 434 U.S. at 580; *Shapiro* v. *United States*, 335 U.S. 1, 16 (1948).

Moreover, payment by the employer of union travel expenses and per diem is not the norm in the private sector. The National Labor Relations Board has compelled employers to pay union travel expenses and per diem only as an extraordinary remedy for an employer's failure to bargain in good faith. See *Division of Military & Naval Affairs* v. *FLRA, supra*, 683 F.2d at 48. In view of the previous administrative practice in the federal sector and the prevailing patterns in the private sector, it is reasonable to expect that Congress would have affirmatively expressed any intent to impose a new and different rule. See *Weinberger* v. *Rossi*, No. 80-1924 (Mar. 31, 1982), slip op. 8; *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 278-279, 285 n.13 (1974). As the FLRA has acknowledged, there is no such expression here.

If anything, the language and history of the statute argue against the FLRA interpretation. Section 7131 (a) refers to official time for employees in terms of the period they "otherwise would be in a duty status." But per diem allowances are primarily for costs generally incurred outside duty hours—breakfast, dinner, and overnight lodging. Travel expenses also are frequently incurred outside duty hours. The reference to duty status thus suggests that Congress did not intend to use Section 7131(a) as a vehicle for imposing liability on the government for travel expenses and per diem of employee union representatives.

In addition, when Congress enacted Title VII it expressly changed the treatment of official time. Previously, Section 20 of Executive Order No. 11491, 34 Fed. Reg. 17614 (1969), had permitted parties to agree on grants of official time to employee union

negotiators, up to a total of 40 hours or one-half of the bargaining time during regular working hours. In contrast, Section 7131(a) now mandates unlimited official time for negotiations during the time an employee otherwise would be in a duty status. This specific change from the executive order program was discussed by Congress during consideration of Title VII.[14] The treatment of official time stands in sharp contrast to the absence of any mention of an intent to alter the established practice under which agencies were not required to pay union travel expenses or per diem. The inappropriateness of implying any intent to change the treatment of travel expenses and per diem is confirmed by the statement of Representative Udall, the primary sponsor of Title VII, during the debate on the legislation: "What we really do is to codify the 1962 action of President Kennedy in setting up a basic framework of collective bargaining for Federal employees. * * * The Federal employee unions do not get much out of this amendment process that is not already in the Executive order." 124 Cong. Rec. 29182 (1978).

b. Given the lack of any evidence that Congress intended to create agency liability for travel expenses and per diem of employee union representatives, the court of appeals' ruling is plainly contrary to the rule of statutory construction applied by this Court in *United States* v. *Zazove*, 334 U.S. 602 (1948). In *Zazove* the Court refused to adopt a statutory interpretation that would have increased the government's monetary liability without a clear showing that Congress so intended (*id.* at 616-617). The Court noted that "Congress nowhere specified that the United States would bear the huge cost of the enhanced lia-

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[14] See, e.g., 124 Cong. Rec. 29188 (1978).

bility" caused by the interpretation urged by the respondent in that case. "[A]nd that striking omission is persuasive, in the absence of cogent considerations to the contrary, that no generosity of this magnitude was contemplated" (*ibid.*; footnote omitted). Accord, *Pine Hill Coal Co.* v. *United States*, 259 U.S. 191, 196 (1922).

Indeed, the court of appeals' ruling is contrary to the more general principle that waivers of sovereign immunity must be strictly construed. See *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941). A waiver of sovereign immunity may not be implied, but must be unequivocally expressed. See, e.g., *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *Testan*, 424 U.S. 392, 399 (1976). This principle is fully applicable to the case of monetary claims by federal employees against a federal agency. See *United States* v. *Testan*, *supra* (employee claims for back pay). Because payments for travel expenses and per diem are nowhere mentioned in Title VII or its legislative history, there is no unequivocally expressed waiver of sovereign immunity that would permit a court to enforce an order requiring such payments.[15]

c. Although the language and history of Title VII and principles of statutory construction indicate that the FLRA Interpretation and Guidance is incorrect,

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[15] We do not argue that the Authority may not order appropriate monetary relief once it has properly found an unfair labor practice. See 5 U.S.C. (Supp. V) 5596(b). However, there must first be an unfair labor practice to be remedied. The Authority may not, as it has done here, identify an unfair labor practice by stretching the statute to find an implied intent to pay.

the court of appeals concluded that it should defer to that Interpretation and that the Interpretation was reasoned and supportable. The court's conclusion is erroneous for several reasons.

First, the court's deference was inappropriate in this case. The Interpretation and Guidance is an interpretive rule and thus is entitled to less weight than a rule issued pursuant to the FLRA's rulemaking authority (App. A, *infra*, 4a). Moreover, as this Court noted in *NLRB* v. *Brown*, 380 U.S. 278, 291-292 (1965), quoting *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965), " 'the deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.' " Whether to require federal agencies to pay out substantial sums of money to fund federal employee union travel and per diem is plainly a "major policy decision[] properly made by Congress," and the court therefore should have examined critically the FLRA's reasoning. In addition, and perhaps most important, the FLRA's Interpretation was based in large part on its construction of the term "official business," as used in 5 U.S.C. (& Supp. V) 5702, a statute that is administered not by the Authority but by the General Services Administration. See 5 U.S.C. 5707(a). No deference is due an agency's interpretation of a statute it does not administer. See, e.g., *Department of Agriculture* v. *FLRA*, *supra*, *slip* op. 9-10; *New Jersey Air National Guard* v. *FLRA*, 677 F.2d 276, 281-282 n.6 (3d Cir.), cert. denied, No. 82-224 (Nov. 8, 1982); *Whaley* v. *Schweiker*, 663 F.2d 871, 873 (9th Cir. 1981); *March* v. *United States*, 506 F.2d 1306, 1316 (D.C. Cir. 1974).

Second, the reasoning offered by the FLRA in support of its Interpretation does not withstand scrutiny. The court of appeals found it significant that the Authority had read Sections 7131(c) and 7131(a) consistently (App. A, *infra*, 9a). Section 7131(c) permits the Authority to require official time for employees participating in FLRA proceedings on behalf of their unions. Like Section 7131(a), Section 7131 (c) nowhere mentions travel expenses or per diem. No court has yet determined whether the Authority's reading of the latter section is proper. Thus, it is as unsupported as the Authority's view of Section 7131(a); the fact that the Authority has interpreted the two provisions consistently does not make either interpretation correct.

The court of appeals also accepted the Authority's assertion that, because Congress declared collective bargaining in the federal sector to be in the public interest (see 5 U.S.C. (Supp. V) 7101(a)), employees representing their unions in negotiations must be conducting "official business," and thus are entitled to receive travel expenses and per diem under 5 U.S.C. (& Supp. V) 5702 (App. A, *infra*, 10a). But nothing in 5 U.S.C. (& Supp. V) 5702 itself or in regulations issued by the Administrator of General Services indicates that collective bargaining comes within the term "official business." [16] That term normally refers to

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[16] **Under 5 U.S.C. 5707(a), the Administrator of General Services is authorized to make rules for the administration of 5 U.S.C. (& Supp. V) 5702. The Administrator has concluded that each individual agency should make its own determination of when its employees are engaged in "official business." FLRA's interpretation purporting to override the determinations of individual agencies in the area of collective bargaining thus is inconsistent with the Administrator's decision concerning how the statute should be administered.**

work done on behalf of an agency, pursuant to a directive from the agency. Unlike an agency representative, however, a union bargaining agent is not acting on behalf of the agency; instead, his goal is to gain benefits for the members of the bargaining unit (which includes himself) and for the union. This Court observed last Term that opposing parties in collective bargaining do not pursue the same goal: "The entire process of collective bargaining is structured and regulated on the assumption that '[t]he parties * * * still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest.'" *General Building Contractors Association, Inc.* v. *Pennsylvania*, No. 81-280 (June 29, 1982), slip op. 18, quoting *NLRB* v. *Insurance Agents*, 361 U.S. 477, 488 (1960).[17]

Finally, the court below accepted the Authority's explanation that federal agencies should pay union travel expenses and per diem because Congress intended to equalize the positions of unions and agencies (App. A, *infra*, 10a). The Authority's sole support for this conclusion was a statement by Representative Clay (App. E, *infra*, 43a-44a), which concerned grants of official time for union bargaining agents

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[17] **The Comptroller General has recognized the difference between federal employee union representatives who are on official time during negotiations and agency personnel who are on official business. In an opinion addressing the earlier executive order program, which permitted official time for bargaining on a limited basis, the Comptroller General stated that even though union/agency negotiations "may contribute to the effective conduct of public business," union representatives should not be considered as conducting the official business of the United States. 44 Comp. Gen. 617, 618 (1965). He concluded: "On the contrary it would seem that such negotiations by employee representatives are primarily in the interest of the employee organization" (*ibid.*).**

and did not mention travel costs or per diem (124 Cong. Rec. 29188 (1978)). Thus, it does not support the broad conclusion reached by the Authority.[18] In any event, assuming Congress intended to create greater equality between the positions of unions and agencies, there is no indication that it meant for the Authority to go beyond the steps Congress itself mandated to achieve that objective.[19]

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[18] Moreover, even the treatment of official time adopted by Congress refutes the Authority's view. Rather than requiring precisely equal treatment, Section 7131(a) specifically limits official time for employee union representatives to periods when the employees would otherwise be in a duty status; no such limit is imposed with respect to agency representatives.

[19] The FLRA actually spoke in terms of equalizing the situation of union and management negotiators, noting that the latter are uniformly paid travel expenses and per diem when they are engaged in collective bargaining (App. E, *infra*, 43a-44a). However, employee union representatives are not necessarily in a different position, given the fact that unions have financial resources that can be used for payment of such expenses. See 5 U.S.C. (Supp. V) 7115. The question is whether Congress intended that the federal government, rather than the unions themselves, should reimburse the expenses of employee union representatives engaged in collective bargaining on behalf of the unions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

CAROLYN F. CORWIN
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WILLIAM KANTER
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NOVEMBER 1982

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 80-7673, 81-7021

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, Western Region, Department of Treasury, San Francisco, PETITIONER/CROSS-RESPONDENT

vs.

FEDERAL LABOR RELATIONS AUTHORITY, RESPONDENT/CROSS-PETITIONER

NATIONAL TREASURY EMPLOYEES UNION, INTERVENOR

FLRA No. 9-CA-93

[Filed Mar. 22, 1982]

Argued and Submitted February 11, 1982

On Petition for Review and Cross-Application for Enforcement of an Order of the Federal Labor Relations Authority

BEFORE: DUNIWAY and CANBY, Circuit Judges, and HALBERT,* District Judge

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* Honorable Sherrill Halbert, United States District Judge, Eastern District of California, sitting by designation.

OPINION

HALBERT, District Judge:

The Bureau of Alcohol, Tobacco, and Firearms (ATF) petitions for review of a Federal Labor Relations Authority (FLRA) finding of an unfair labor practice under Title VII of the Civil Service Reform Act, 5 U.S.C. § 7101 *et seq.* The FLRA cross-petitions for enforcement of its order requiring ATF to pay its employee, Pruett, official time, travel expenses, and per diem for time spent negotiating the effect of a proposed change in location of an ATF facility.

I. *Facts*

The facts are not in dispute. In November of 1978, ATF notified the National Treasury Employees Union (Union) that it intended to move its Lodi, California office to Sacramento and establish a reduced duty post at another location in Lodi. The Union wanted to negotiate the move and designated Donald Pruett, an ATF employee, as its representative. Pruett lived in Madera, California, and worked at the ATF office in Fresno.

It was agreed that Pruett and ATF officials would meet at the proposed Sacramento facility on February 23, 1979. They examined that facility, then drove to the new Lodi facility to view it. Eventually, they went to the existing Lodi offices to discuss the impact the moves would have on bargaining unit members and to negotiate matters such as parking facilities, assignment of certain employees, and excused tardiness for the first week in the Sacramento facility. The agreements reached were memorialized in a letter.

The existing collective bargaining agreement between ATF and the Union provided for quarterly meetings for which union representatives would be granted official time. Pruett sought to have the February 23 meeting classified as such, but ATF denied the request. Pruett was told that he could take either leave without pay or annual leave for the day.

As a result of ATF's actions, the Union filed an unfair labor practice charge in June of 1979 and the FLRA General Counsel issued a complaint in January 1980. That complaint charged that ATF's failure to count the February 23 meeting as official time was an unfair labor practice under 5 U.S.C. § 7116(a)(1), (a)(8). (The complaint was amended at the administrative hearing to include charges concerning travel and per diem expenses.)

The administrative law judge's determination that an unfair labor practice had been committed was based on an Interpretation and Guidance issued by the FLRA in December of 1979. That Interpretation stated that Title 5, United States Code, Section 7131(a) mandated the authorization of official time for all collective bargaining negotiations, and that if representatives were entitled to official time they were also entitled to travel and per diem reimbursements. *See* 44 Fed. Reg. 76581 (Dec. 27, 1979). The administrative law judge therefore ordered ATF to pay Pruett the appropriate sums and to post a notice indicating that ATF would grant official time and make travel and per diem payments to union representatives engaged in midterm bargaining negotiations. The FLRA affirmed that finding in September 1980.

II. *Analysis*

A. *Standard of Review*

Review of a decision of the FLRA shall be on the record in accordance with 5 U.S.C. § 706, *see* 5 U.S.C. § 7123(c), and the agency's action shall be set aside only if arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. *Id.* § 706(2)(A). In the case at bar, if the FLRA's Interpretation and Guidance is found to be a reasonable interpretation of the law, the FLRA decision is clearly not arbitrary and capricious. It is therefore necessary to focus our attention on the Interpretation and Guidance itself.

The FLRA has been granted the authority to promulgate rules and regulations under 5 U.S.C. § 7134. The Interpretation, however, does not appear to have been issued pursuant to that statute, although the FLRA did provide notice and an opportunity to comment. *See* 44 Fed. Reg. 42778 (July 20, 1979); *id.* at 76581 (Dec. 27, 1979). Rather, the Interpretation seems to have been issued pursuant to 5 U.S.C. § 7105(a)(1), which requires the FLRA to provide leadership in establishing policies and guidelines and to take responsibility for carrying out the purpose of Title VII. As an interpretative rule, therefore, it may be accorded less weight than rules issued pursuant to the delegated rulemaking authority of Congress. *See General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141 (1976). The Supreme Court has stated that although interpretative rules reflect an agency's special expertise and are thus entitled to deference, their weight on judicial review will also depend on the thoroughness evident in their consideration, the validity of the reasoning, and their consistency with ear-

lier and later pronouncements. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

Since the Interpretation at issue merely expresses the agency's view on the meaning of existing law, based on examination of the legislative history and general purpose of Title VII, it does not have the force of law, but shall be given deference if reasoned and supportable. *See, e.g., Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 11 (1980); *Magma Copper Co.* v. *Secretary of Labor*, 645 F.2d 694, 696 (9th Cir. 1981), *cert. denied* 102 S. Ct. 475 (1981); *Montana Power Co.* v. *Environmental Protection Agency*, 608 F.2d 334, 345 (9th Cir. 1979). If an agency's construction of a statute is reasonably defensible, it should not be rejected simply because a court might prefer another view, *see Department of Defense* v. *FLRA*, 659 F.2d 1140, 1161 (D.C. Cir. 1981), *cert. denied sub nom. AFGE* v. *FLRA*, 50 L.W. 3669 (1982), although an agency should not be permitted to usurp Congressional authority to make major policy decisions. *Ford Motor Co.* v. *NLRB*, 441 U.S. 488, 497 (1979). It is our determination that the Interpretation and Guidance under examination here is reasoned and supportable.

B. *The grant of official time for midterm collective bargaining negotiations*

Title 5, United States Code, Section 7131(a) provides:

> Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceedings, dur-

> ing the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

The question presented is whether that section authorizes "official time" for employee representatives during midterm negotiations, as opposed to the negotiation of a basic collective bargaining agreement. The FLRA found, based on an examination of the express language of the statute, legislative history, and public policy, that it does. We agree.

Turning first to the statutory language, we take note of the axiom that whenever the same word or phrase is used in different parts of a statute, it will be presumed to be used in the same sense throughout unless there is evidence of a contrary intent. *See, e.g., Northern Plains Resource Council* v. *EPA*, 645 F.2d 1349, 1355 (9th Cir. 1981); *Chugach Natives, Inc.* v. *Doyon, Ltd.*, 588 F.2d 723, 725 (9th Cir. 1978); *United States* v. *Gertz*, 249 F.2d 662, 665 (9th Cir. 1957). That rule is especially important in cases such as this, where the answer to our inquiry does not appear either on the face of the statute or in the legislative history.

Title VII defines "collective bargaining" as performance of the mutual obligation to meet at reasonable times and to bargain in a good faith effort to reach agreement with regard to conditions of employment,[1] 5 U.S.C. § 7103(a)(12), and a collective bar-

[1] "Conditions of employment" are defined as personnel policies affecting working conditions. *Id.* § 7103(a)(14). Therefore, the obligation to bargain in good faith clearly applies to these facts.

gaining agreement is defined as an agreement entered into as a result of collective bargaining. *Id.* § 7103(a)(8). Furthermore, Section 7114(b)(3) provides that in order to fulfill the obligation to negotiate in good faith, agency and union representatives shall meet "as frequently as may be necessary." It is therefore clear that the reference to "negotiation of a collective bargaining agreement" in Section 7131 (a) encompasses all situations in which agency and union representatives meet with the objective of conducting good faith negotiations concerning conditions of employment. The statute's application cannot be limited to the negotiation of basic agreements.

The legislative history of Title VII likewise supports the conclusion that official time is authorized for employee representatives conducting midterm bargaining. Title VII is for the most part a codification of Executive Order 11491,[2] *reprinted in* 5 U.S.C. foll. § 7103. Section 20 of Executive Order 11491 allowed management and employees to negotiate grants of official time subject to certain limitations, and was interpreted by the Federal Labor Relations Council[3] to limit such grants of official time to the negotiation of basic agreements or management-initiated changes in working conditions. *See Local 2151, A.F.G.E., AFL-CIO, et al.*, F.L.R.C. 76A-106, 5 F.L.R.C. 373, 374, 375 (May 18, 1977).

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[2] 5 U.S.C. § 7135(b) provides that the provisions of, *inter alia*, Executive Order 11491 shall remain in effect unless superseded by Title VII. Under the FLRA's reasoning, Section 7131(a) supersedes the Order's provision that grants of official time may be negotiated.

[3] The Federal Labor Relations Council was the predecessor of the FLRA.

When debating Title VII, however, Congress rejected language that would have preserved the limitation on authorization of official time to negotiations of basic agreements,[4] *see* S. Rep. No. 95-969, 95th Cong., 2d Sess. 112, *reprinted in* [1978] U.S. Code Cong. & Ad. News 2723, 2834, enacting instead the language of Section 7131(a). ATF argues that since that section is silent with regard to official time for midterm negotiations, Congress evidently intended to preserve the restrictions of Executive Order 11491. The rejection of language that would have yielded that result persuades us that the FLRA reasonably concluded that Congress intended to enact an authorization of official time for midterm as well as basic collective bargaining agreements.

Congress' specific finding that collective bargaining in the federal service is in the public interest further aids this conclusion. *See* 5 U.S.C. § 7101(a). The FLRA has taken this a step further by reasoning that equalization of the positions of labor and management enhances the effectiveness of collective bargaining. The granting of official time for employee negotiators merely reflects the situation of government negotiators, who are commonly afforded official time for collective bargaining negotiations.

In short, we are unpersuaded by ATF's argument that the silence of the statute and legislative history

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[4] Section 7232 of the Senate version of the bill limited grants of official time to negotiations "relating to the negotiation or renewal of a basic collective bargaining agreement, as opposed to negotiations which arise out of circumstances during the term of the basic agreement (midcontract negotiations)." Furthermore, that section limited the amount of official time that could be authorized in any event to 40 hours or one-half the time spent in negotiations, and required that such grants be negotiated by the parties.

requires us to assume that Congress intended to restrict the availability of official time for midterm negotiations. Congress had the clear opportunity to adopt language limiting official time to the negotiation of basic agreements. Its failure to do so, combined with the fact that a consistent reading of the statutory language indicates that "collective bargaining agreement" refers to both midterm and basic agreements, leads us to conclude that the FLRA's Interpretation and Guidance is reasoned and supportable on this point; hence, it will be given deference.

C. *Availability of travel expenses and per diem*

The FLRA's determination that union negotiators are entitled to travel expenses and a per diem is based largely on its finding that Section 7131(a) authorizes official time for midterm negotiations. Once again, neither the statutory language nor the legislative history expressly refers to this question. The FLRA identified three factors that nevertheless appear to indicate that these expenses are authorized.

Analogous language to Section 7131(a) exists to support the conclusion that these reimbursements are warranted. Section 7131(c) states that the FLRA shall determine whether labor representatives in proceedings before the FLRA "shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status." That language is nearly identical to language in Section 7131(a), and has been interpreted to mandate travel expenses and per diem any time the FLRA deems the presence of an employee necessary at FLRA proceedings. *See* 5 C.F.R. § 2429.13. It is therefore reasonable to conclude that both subsections should be given the same interpretation in this regard.

The FLRA mustered additional support for its position by observing that if union negotiators are on official time, they should be interpreted to be on official government business within the meaning of 5 U.S.C. § 5702(a). Employees on official government business are entitled to a per diem allowance for travel. *See* 5 U.S.C. § 5702(a). The FLRA buttressed its conclusion that labor representatives conducting collective bargaining negotiations are on official government business by citing 5 U.S.C. § 7101 (a)(1)(B), in which Congress stated that collective bargaining in the civil service contributes to the effective conduct of public business. Thus, it appears that labor representatives should be treated similarly to other government employees conducting business for the government.

Congress' finding that collective bargaining is in the public interest also indicates that the positions of management and labor should be equalized with regard to collective bargaining, according to the FLRA. It is beyond argument that if union representatives are granted travel expenses and a per diem, their position would more nearly equal that of management representatives, who were found uniformly to be paid travel expenses and per diem. The statements of Congress to the effect that collective bargaining is favored by public policy reasonably support the FLRA's effort to equalize the positions of the parties to collective bargaining negotiations.

In light of the above, we find no merit to ATF's contentions that the availability of travel expenses and per diem will impair the willingness of union negotiators to reach agreement. A remedy for that

eventuality is provided by Title VII's mandate of good faith negotiations and the availability of recourse to the Federal Service Impasses Panel. *See generally* 5 U.S.C. § 7119. We are unwilling to construe the FLRA's Interpretation and Guidance as a license for labor representatives to be dilatory and extravagant; actually, it appears that that Interpretation yields no more advantage to labor negotiators than that formerly possessed by management negotiators.

III. *Conclusion*

The FLRA's Interpretation and Guidance is reasoned and supportable, and therefore will be given deference by this Court. The FLRA, acting in its own area of expertise, has interpreted the relevant language of Title VII in a clearly defensible manner, and we are neither permitted nor inclined to substitute a different judgment.

ATF's petition for review is denied, and the Order of the Federal Labor Relations Authority is ordered enforced.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No[s]. 80-7673 [and] 81-7021

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
Western Region, Department of Treasury,
San Francisco, PETITIONER/CROSS-RESPONDENT

vs.

FEDERAL LABOR RELATIONS AUTHORITY,
RESPONDENT/CROSS-PETITIONER

NATIONAL TREASURY EMPLOYEES UNION,
INTERVENOR

FLRA #9-CA-93
Northern CA

JUDGMENT

Upon Petition to Review a Decision of The FEDERAL LABOR RELATIONS AUTHORITY

This Cause came on to be heard on the Transcript of the Record from The FEDERAL LABOR RELATIONS AUTHORITY and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the petition for review of an order by the FLRA in this cause be

and hereby is denied, and the Order of the FLRB [*sic*] is ordered enforced.

Filed and entered March 22, 1982

A TRUE COPY
ATTEST July 22, 1982
PHILLIP B. WINBERRY
Clerk of Court

by: /s/ Oscar Tagle
Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 80-7673 [and] 81-7021

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
Western Region, Department of Treasury,
San Francisco, PETITIONER/CROSS-RESPONDENT

vs.

FEDERAL LABOR RELATIONS AUTHORITY,
RESPONDENT/CROSS-PETITIONER

and

NATIONAL TREASURY EMPLOYEES UNION,
INTERVENOR

[Filed July 13, 1982]

Before: DUNIWAY and CANBY, Circuit Judges, and HALBERT,* District Judge

ORDER

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion of a rehearing in banc.

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion of a rehearing in banc is rejected.

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* The Honorable Sherrill Halbert, Senior United States District Judge for the Eastern District of California, sitting by designation.

APPENDIX D

4 FLRA No. 40

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. 9-CA-93

BUREAU OF ALCOHOL, TOBACCO and FIREARMS,
WESTERN REGION, DEPARTMENT OF THE TREASURY,
SAN FRANCISCO, CALIFORNIA, RESPONDENT

and

NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 81, CHARGING PARTY

DECISION AND ORDER

The Administrative Law Judge in the above-entitled proceeding issued his Recommended Decision and Order finding that Respondent had engaged in the unfair labor practice alleged in the complaint, and recommending that it cease and desist therefrom and take certain affirmative actions as set forth in the attached Administrative Law Judge's Recommended Decision and Order. Thereafter, the Respondent filed exceptions to the Administrative Law Judge's Recommended Decision and Order.

Pursuant to section 2423.29 of the Authority's rules and regulations (5 CFR 2423.29) and section 7118 of the Federal Service Labor-Management Relations Statute (5 U.S.C. §§ 7101-7135), the Authority has reviewed the rulings of the Administrative Law Judge made at the hearing and finds that no prejudicial error was committed. The rulings are

hereby affirmed. Upon consideration of the Administrative Law Judge's Recommended Decision and Order, and the entire record in the subject case, including the Respondent's exceptions, the Authority hereby adopts the Administrative Law Judge's findings, conclusions, and recommendations, to the extent consistent herewith.

ORDER

Pursuant to section 2423.29 of the Federal Labor Relations Authority's rules and regulations and section 7118 of the Statute, the Authority hereby orders that the Bureau of Alcohol, Tobacco and Firearms, Western Region, Department of the Treasury, San Francisco, California, shall:

1. Cease and desist from:

(a) Failing and refusing to provide to Donald Pruett or any Agency employee, while engaged in representing the National Treasury Employees Union, Chapter 81, the employees' exclusive representative, during Union-Agency negotiations of a collective bargaining agreement, official time for such participation including necessary travel time as occurs during the employee's regular work hours and when the employee would otherwise be in a work or paid leave status. In addition, necessary transportation and per diem expenses shall be paid by the employing activity or agency.

(b) In any like or related matter, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative actions in order to effectuate the purposes and policies of the Statute:

(a) Provide Union representative Donald Pruett official time for the performance of his representa-

tional duties on February 23, 1979, and make him whole for the annual leave he utilized on that date, and upon submission of an appropriate voucher, pay to Donald Pruett whatever travel and per diem expenses an employee engaged in official Agency business would be entitled.

(b) Post at its various offices in the Western Region wherein unit employees are located, copies of the attached notice marked "Appendix." Copies of said notice, to be furnished by the Regional Director for Region 9, after being signed by an authorized representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Federal Labor Relations Authority, in writing, within 30 days from the date of this order as to what steps have been taken to comply herewith.

Issued, Washington, D.C., September 29, 1980

/s/ Ronald W. Haughton
RONALD W. HAUGHTON
Chairman

/s/ Henry B. Frazier III,
HENRY B. FRAZIER III
Member

/s/ Leon B. Applewhaite
LEON B. APPLEWHAITE
Member

FEDERAL LABOR RELATIONS AUTHORITY

APPENDIX

NOTICE TO ALL EMPLOYEES

PURSUANT TO

A DECISION AND ORDER OF THE

FEDERAL LABOR RELATIONS AUTHORITY

AND IN ORDER TO EFFECTUATE THE

POLICIES OF CHAPTER 71 OF TITLE 5 OF THE

UNITED STATES CODE

FEDERAL SERVICE LABOR-MANAGEMENT

RELATIONS

WE HEREBY NOTIFY OUR EMPLOYEES

THAT:

WE WILL NOT fail or refuse to provide to Donald Pruett or any Agency employees, while engaged in representing the National Treasury Employees Union, Chapter 81, the employees' exclusive representative, during Union-Agency negotiations of a collective bargaining agreement, official time for such participation including necessary travel time as occurs during the employee's regular work hours and when the employee would otherwise be in a work or paid leave status. In addition, necessary transportation and per diem expenses shall be paid by the employing activity or agency.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce our employees in the exercise of their rights assured by the Statute.

WE WILL provide Union representative Donald Pruett official time for the performance of his repre-

sentational duties on February 23, 1979, and make him whole for the annual leave he utilized on that date and, upon submission of an appropriate voucher, pay to Donald Pruett whatever travel and per diem expenses an employee engaged in official Agency business would be entitled.

_____

(Agency or Activity)

Dated: _____ By: _____

Signature

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

If employees have any questions concerning this Notice or compliance with any of its provisions, they may communicate directly with the Regional Director, Region 9, Federal Labor Relations Authority, whose address is: 450 Golden Gate Avenue, Room 11408, P.O. Box 36016, San Francisco, CA 94102, and whose telephone number is (415) 556-8105.

[SEAL]

UNITED STATES OF AMERICA
FEDERAL LABOR RELATIONS AUTHORITY
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 705 - 1111 20th Street, NW.
Washington, D.C. 20036

Case No. 9-CA-93

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
WESTERN REGION, DEPARTMENT OF THE TREASURY,
SAN FRANCISCO, CALIFORNIA, RESPONDENT

and

NATIONAL TREASURY EMPLOYEES UNION,
CHAPTER 81, CHARGING PARTY

Michael Sitcov, Esquire, For the Respondent

Stephanie Arthur, Esquire, For the General Counsel

David Handsher, Esquire, For the Charging Party

Before: SALVATORE J. ARRIGO, Administrative Law Judge

DECISION

Statement of the Case

This matter arose under the provisions of the Federal Service Labor-Management Relations Statute, 92 Stat. 1191, 5 U.S.C. § 7101 *et seq.*, (herein referred to as the Statute). Essentially, the case involves whether Respondent is obligated under the

Statute to grant official time, travel and per diem expenses to an employee-union representative relative to his participation in collective bargaining negotiations with the Respondent.

Upon an unfair labor practice charge filed on June 21, 1979, the General Counsel of the Federal Labor Relations Authority, by the Regional Director for Region 9, issued a Complaint and Notice of Hearing on January 29, 1980, alleging that the Bureau of Alcohol, Tobacco and Firearms, Western Region, an activity within the Department of the Treasury, engaged in unfair labor practices within the meaning of Sections 7116(a)(1) and (8) of the Statute by refusing to grant to Donald Pruett, a representative of the National Treasury Employees Union, Chapter 81, (the Union) official time in which to engage in negotiations over the impact and implementation of Respondent's proposals concerning an office relocation.[1] Respondent denied the commission of any unfair labor practice and a hearing before the undersigned was conducted on February 27, 1980.

At the hearing all parties were represented by counsel and afforded full opportunity to adduce evidence and call, examine and cross examine witnesses. Briefs were filed by Respondent and Counsel for the General Counsel.

Upon the entire record in this matter, my observation of the witnesses and their demeanor, and from my evaluation of the evidence, I make the following:

Findings of Fact

At all material times the Union has been the exclusive bargaining representative for an appropriate

[1] The complaint was amended at the hearing, without objection, to reflect that "official time" included the payment of travel and per diem expenses.

unit of Respondent's employees. Headquarters for Respondent's Western Region is apparently located in San Francisco, California, and the Region is composed of various satellite offices, including Area Offices and Post of Duty Offices.

By letter dated November 21, 1978, Respondent notified the Union's President, Joseph Sheean, of San Francisco, that it intended to relocate the Lodi, California Area Office to Sacramento, California, and establish a reduced Post of Duty Office in Lodi. It was anticipated that the action would require relocating nine employees from Lodi to Sacramento. Union president Sheean responded on December 1, 1978, advising Respondent that the Union wished to negotiate the decision to move or, alternatively, the impact the move would have on bargaining unit employees. The Union named Donald Pruett, a Steward in Respondent's Fresno Area Office who lived in Madera, California, to represent it in the matter.

By letter dated January 4, 1979, Pruett informed Respondent of the Union's desire to negotiate regarding "the condition and suitability of the facilities to be used by bargaining unit members . . ." as well as the options available to unit employees who did not volunteer for reassignment or who volunteered but chose not to move their residences.[2]

Respondent decided that since Pruett and Respondent's own Chief of Field Operations, Thomas Crone, had not yet seen the facilities under discussion, it would be to everyone's best interest to conduct the negotiations and view the various new facilities at the same time. Accordingly, Mardell Keehan, Personnel Specialist for Respondent, telephoned Union Rep-

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[2] Lodi is approximately thirty-four miles from Sacramento. *Rand McNally Road Atlas*, 51st Annual Edition, 1975, p. 16.

resentative Pruett and informed him that the parties would meet at 9:30 a.m. on February 23, 1979, at the site of the new Sacramento Area Office.[3] Nothing was said at the time relative to a specific format, time or location for negotiations on the issues raised by the rearrangement of the offices.

On February 21, 1979, Pruett called both Personnel Specialist Keehan and Chief of Field Operations Crone and asked them if the February 23 meeting could be incorporated with a "quarterly" meeting under the collective bargaining agreement or would he be permitted to take "bank time" for the period.[4] Pruett's request was denied and he was told that he would have to take either annual leave or leave without pay for the meeting.[5]

As suggested by Respondent, the parties met on February 23, 1979, around 9:30 a.m. at the new Sac-

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[3] Mardell Keehan was unavailable to testify at the hearing conducted on February 27, 1980. The parties agreed to present Ms. Keehan's testimony by deposition which was taken on March 7, 1980. Accordingly, the deposition of Mardell Keehan is hereby received as part of the record herein.

[4] Apparently the collective bargaining agreement between the Union and Respondent provided official time for union representatives at "quarterly" meetings. It is also apparent that using "bank time" would result in Pruett remaining in work status during the day.

[5] The telephonic replys [*sic*] were followed up with letters to the Union dated February 27 and March 21, 1979, which indicated that Respondent's employees could not receive official time for midterm negotiations, the latter stating that Respondent's National and Regional labor relations staff advised that employees did not ". . . receive time (i.e. official time, Bank Time, Administrative Leave, etc.) or reimbursement for any expenses in connection with Midterm negotiations." Accordingly, Pruett used eight hours annual leave on February 23, 1979.

ramento Area Office.[6] Pruett represented the Union and Respondent was represented by Keehan, Crone and two other management employees. The group examined the future work space which, at the time, was an open area although the floor was marked with tape for wall partitions and phone outlets. The cafeteria facilities were examined and the parties discussed related matters such as the manner in which walls would be constructed, the future location of work desks and access to rest rooms. Pruett indicated that the work area was acceptable but expressed dissatis-

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[6] The following account is a composite of the testimony of Pruett, Keehan and Crone. While Pruett's overall version of the incidents which occurred on February 23 corresponds in many respects with Keehan's and Crone's testimony, I am inclined to find Pruett's recollection to be somewhat less reliable. Pruett's testimony regarding the driving times from his home to and from the meeting places raises questions unanswered in the record but would seem to support Respondent's recollection of where the parties first met. Further, Respondent's corroborated testimony as to the order in which the facilities were visited and that a detailed discussion concerning the Union's proposals occurred only after visiting the new sites appears to be more reasonable. Thus, Pruett testified that the Union's proposals were discussed in detail at the first location visited and the final meeting of the day was a "brief proposing session," the details of which he could not recall. Keehan and Crone testified that a detailed discussion occurred after all the facilities had been visited. It would seem that an expression of final opinion by the Union on the "condition and suitability of the facilities" would most likely be a matter which would be reserved, at least from an overall perspective, until after the new facilities had been visited. Moreover, Pruett's testimony was often vague and conclusionary while Keehan's responses reflected a more detailed recollection of events. In any event, there is no real dispute as to what was discussed on February 23, only where and when the conversations took place.

faction with parking facilities and management replied that the parking arrangements at Sacramento were, nevertheless, better than a number of other offices.

After about an hour at the Sacramento location the group proceeded to Lodi where they had lunch. After lunch the parties met at the new Lodi Post of Duty Office. The premises were examined and the colloquy that occurred was much the same as that which transpired at Sacramento. The group remained at the Lodi office between thirty and forty-five minutes before adjourning to the old Lodi Area Office.

The session at the old Lodi Area Office encompassed a consideration of the various proposals which the Union made it its letter to Respondent dated January 4, 1979, *supra*. Pruett again expressed satisfaction with the new facilities except for the parking arrangements at Sacramento. However, Respondent maintained that no closer parking was available. During the meeting the parties also discussed excusing late arrival of employees at the new Sacramento Area Office while employees were adjusting their commuting schedules and the job assignments of two employees who were involuntarily transferred to Sacramento. At the conclusion of the meeting, which lasted approximately an hour and a half, Pruett returned to his home in Madera and Keehan and Crone drove back to their residences in the San Francisco area.[7]

By letter to Pruett dated March 8, 1979, Respondent summarized the decisions made at the February 23, meeting, as follows:

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[7] Pruett left Madera at 6:15 a.m. and returned at 5:45 p.m., on February 23, traveling a total of 308 miles for the trip.

"On February 23, 1979, the impact of the abolishment of the Lodi Area Office and the establishment of the Sacramento Area Office was discussed in the context of the three items listed in your letter dated January 4, 1979. Based on this discussion the following decisions were made:

"1. All parties agreed that the new Sacramento and Lodi facilities are acceptable. As was indicated during the meeting, the Sacramento parking facilities are the closest that could be obtained at this time. Management will continue to try to obtain closer parking as space becomes available.

"2. Article 16, Section 6 provides that a supervisor for adequate reasons, may excuse an employee without charge to leave who is unavoidably or necessarily absent for less than one hour or tardy; however, all employees will be expected to adjust their commute schedules to arrive at their new work locations on time.

"The Area Supervisor will hold a group meeting with all employees to discuss these matters and any related questions that employees might have.

"3. The Area Supervisor will hold individual discussions (or joint discussions if preferred by the employees) with John Thalken and Richard Bilger. The supervisor will indicate realistic, anticipated assignments for the two inspectors. Also, he will inform them that, as in the case for any ATF employee, they may apply for consideration for any announced vacancy."

Pruett acknowledged at the hearing that Respondent's March 8 summary, above, accurately reflects the agreements reached by the parties on February 23.

Issues

Counsel for the General Counsel contends that throughout February 23, 1979, the parties were engaged in collective bargaining negotiations and under the principles announced by the Federal Labor Relations Authority in *Interpretation and Guidance*, 2 FLRA No. 31, (December 19, 1979), Pruett was entitled to official time, travel and per diem expenses incurred in connection with the negotiations.

Respondent acknowledges that negotiations on impact of the office relocations occurred on February 23, 1979. However, Respondent contends that Pruett is not entitled to be granted official time for any part of February 23, nor entitled to any travel or per diem expenses. Respondent argues that:

1. The guidance and interpretation contained in 2 FLRA No. 31 is arbitrary and capricious, an abuse of discretion and constitutes the establishment of a policy which is beyond the statutory authority of the Authority.

2. The case herein was initiated prior to January 11, 1979, the effective date of the Statute, and the policy contained in 2 FLRA No. 31, enunciated in December 1979, should not apply retroactively to govern the instant case. Accordingly, Respondent contends that the situation herein should be governed by Executive Order 11491, as amended, under which official time would not have been required for the February 23, 1979, negotiations.

3. On the facts of the case ". . . little, if any, time spent during (February 23) would qualify as negotiations, and the General Counsel has failed to establish how much time should be granted, if any." Respondent urges that substantially all of the activities of February 23 pertained to gathering information

in preparation for negotiations and not the negotiations themselves. Further, according to Respondent, Pruett's claim is not valid in that no travel voucher was ever submitted claiming travel and per diem expenses for February 23.

4. The payment of per diem and travel expenses pursuant to 2 FLRA No. 31 is contrary to law in that money has not been specifically appropriated for this purpose.

Discussion and Conclusions

In its *Interpretation and Guidance*, 2 FLRA No. 31, the Authority concluded that the official time provisions of Section 7131(a) of the Statute encompass all negotiations of a collective bargaining agreement between an exclusive representative and an agency.[8] In reaching this conclusion the Authority relied on the literal language and legislative history of Section 7131(a) as supported by the express findings and purposes of the Statute reflected in Section 7101(a), which states that "labor organizations and collective bargaining in the civil service are in the public interest." The Authority further concluded that employees who are on official time under Section 7131 of the Statute while representing an exclusive representative in the negotiation of a collective bargaining agreement are "entitled to payments from agencies for their duty time and travel and per diem expenses."

As an Administrative Law Judge I am constrained to follow the Authority's pronouncements. Therefore, to address arguments which attack a statutory inter-

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[8] Section 7131(a) provides, in relevant part: "Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes . . . during the time the employee otherwise would be in a duty status. . ."

pretation made by the Authority or question the Authority's power or judgment in treating a matter would serve no useful purpose, especially where, as here, the Authority's position is clear and unmistakable. Accordingly, I reject Respondent's argument challenging the Authority's decision in 2 FLRA No. 31 as being arbitrary and capricious, an abuse of discretion and beyond its statutory authority. Similarly, I reject Respondent's contention that the payment of per diem and travel expenses, as required by the Authority in 2 FLRA No. 31, is contrary to law.

Further, I find no merit in Respondent's argument that the case herein was initiated prior to January 11, 1979, the effective date of the Statute, and therefore a finding of violation of the Statute herein would involve retroactive application of the Statute. True, the Union's request to negotiate was made in its letter of December 1, 1979 [*sic*], *supra*, and the Union submitted its proposals on January 4, 1979, *supra*. However the request and refusal to grant official time or expenses to the Union's representative did not occur until February 2[illegible], 1979, and thereafter. In my view it was the demand and refusal to grant Pruett official time to engage in negotiations that initiated the case herein. The Statute was in effect on the dates of the demand and refusal and the Authority, by its December 19, 1979, *Interpretation and Guidance* on official time, created no new rights but merely gave its view on the scope and meaning of Section 7131 of the Statute, as enacted. Thus, I conclude that the effect of the Authority's statement on this matter governs all situations involving official time for negotiations which occurred after January 11, 1979, the effective date of the Statute.

I also reject Respondent's contention that "little, if any, time spent during February 23, 1979 would qualify as negotiations . . ." Testimony from Respondent's own witnesses, documentary evidence of record, most notably Respondent's March 8, 1979 letter to the Union, *supra*, and admissions by Respondent in its brief belie a claim that no negotiations within the meaning of the Statute took place on February 23. Indeed, Respondent's witnesses testified that the last one and a half hour, or twenty-five percent of the day's meeting which began at 9:30 a.m. and concluded at 3:30 p.m. on February 23, 1979, was spent on impact negotiations.

Moreover, I conclude that the entire February 23 activities of the parties constituted negotiations within the meaning of Section 7131(a) of the Statute when considered in all the circumstances of the situation. Thus, Respondent's letter to the Union of February 21, *supra*, setting the date for the negotiations, although stating that negotiations would occur at the old Lodi Area Office, did not establish a time when the negotiations would commence. Nor can the letter be fairly interpreted to indicate that no discussions tantamount to negotiations would take place before the end of the tour of the new facilities. Respondent itself decided that it would be to everyone's best interest to conduct the negotiations and view the various new facilities at the same time. Respondent set the place where the day's activities were to begin without delimiting in any way what would be open for discussion at any time. While the activities of the parties at the new Sacramento Area Office and the new Lodi Post of Duty Office involved, in large measure, both parties gathering information about the physical condition and suitability of the two sites, there was some

discussion at these locations with regard to Pruett's acknowledgement [*sic*] that the building layouts were acceptable to the Union and his concern with the parking arrangement at Sacramento.

Also, it is noted that Respondent's letters to the Union of February 27 and March 21, 1979, *supra*, rejecting Pruett's claim for official time, while acknowledging that negotiations occurred, did not seek to segregate portions of February 23 as negotiating or non-negotiating time. Nor did Respondent's letter of March 8, summarizing the decisions reached on February 23, indicate that the parties only engaged in negotiations at the old Lodi Area Office at the end of that day.

Indeed, it is apparent that both parties before, during and immediately after February 23, considered the day's activities and discussions to constitute a continuous period of negotiation on the office relocations with the final session of the day culminating in a specific agreement on the Union's proposals. Accordingly, considering the total context of all the circumstances surrounding the February 23, 1979, meeting, I conclude that the entire day was spent in the process of negotiation within the meaning of the Statute.

With regard to Respondent's position that no travel voucher was submitted by Pruett and therefore no claim of violation of the Statute can be maintained, the uncontested record on this matter reveals two requests for official time and four separate replies by Respondent's agents that no official time would be granted to Pruett for the February 23 negotiations. It is reasonable to infer that since Pruett was clearly and repeatedly informed by management representatives that official time and expenses would not be forthcoming, a voucher requesting the same would not

be authorized for payment. It is axiomatic that the law does not require a futile gesture and on the state of the record herein, further consideration of Respondent's argument is unwarranted.

Accordingly, in view of the entire foregoing I find and conclude that by its failure and refusal to provide Union representative Donald Pruett with official time and whatever travel and per diem expenses he may have been entitled to were he considered to be on official Agency business while performing Union representational duties on February 23, 1979, Respondent failed and refused to comply with Section 7131 of the Statute and thereby violated Sections 7116(a)(1) and (8) of the Statute.[9]

Having found and concluded that Respondent violated Sections 7116(a)(1) and (8) of the Statute, I recommend that the Authority issue the following:

ORDER

Pursuant to Section 7118(a)(7) of the Federal Labor-Management Relations Statute and Section 2423.29 of the Final Rules and Regulations, it is hereby ordered that Bureau of Alcohol, Tobacco and Firearms, Western Region, Department of the Treasury, San Francisco, California, shall:

1. Cease and desist from:

(a) Failing and refusing to provide to Donald Pruett or any Agency employee, while engaged in

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[9] Sections 7116(a)(1) and (8) declare it to be an unfair labor practice for an agency: "(1) To interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter . . . (8) To otherwise fail or refuse to comply with any provision of this chapter."

representing the National Treasury Employees Union, Chapter 81, the employees' exclusive representative, during Union-Agency negotiations of a collective bargaining agreement, official time and whatever travel and per diem expenses an employee engaged in official Agency business would be entitled.

(b) In any like or related matter, interfering with, restraining, or coercing employees in the exercise of their rights assured by the Statute.

2. Take the following affirmative action in order to effectuate the purposes and policies of the Statute:

(a) Provide Union representative Donald Pruett official time for the performance of his representational duties on February 23, 1979, and make him whole for the annual leave he utilized on that date, and upon submission of an appropriate voucher, pay to Donald Pruett whatever travel and per diem expenses an employee engaged in official Agency business would be entitled.

(b) Post at its various offices in the Western Region wherein unit employees are located, copies of the attached notice marked "Appendix." Copies of said notice, to be furnished by the Regional Director for Region 9, after being signed by an authorized representative, shall be posted by it immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 9, 450 Golden Gate Avenue, Room 11409, P.O. Box 36016, San Francisco, California 94102, in writing,

within 30 days from the date of this Order, what steps it has taken to comply herewith.

/s/ Salvatore J. Arrigo
SALVATORE J. ARRIGO
Administrative Law Judge

Dated: May 12, 1980
Washington, D.C.

APPENDIX E

2 FLRA No. 31

UNITED STATES
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C. 20424

Case Nos. O-PS-3 and O-PS-6

INTERPRETATION AND GUIDANCE

As previously announced,[1] the Authority determined, in conformity with its rules and regulations and the Federal Service Labor-Management Relations Statute (92 Stat. 1191), that an interpretation of the Statute was warranted on the following:

1) Whether employees who are on official time under section 7131 of the Statute while representing an exclusive representative in the negotiation of a collective bargaining agreement are entitled to payments from agencies for their travel and per diem expenses.

2) Whether the official time provisions of section 7131(a) of the Statute encompass all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement.

Concurrently, the Authority invited interested persons to express their views in writing with respect to the above matters, including the impact, if any, of section 7135(a)(1) of the Statute (92 Stat. 1215) on these matters. The responses submitted to the Au-

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[1] Federal Labor Relations Authority, *Notice Relating to Official Time*, 44 Fed. Reg. 42,788 (July 20, 1979).

thority were most thorough and helpful and have been carefully considered. In view of the depth and scope of these submissions, the Authority has determined that no useful purpose would be served by providing for an oral presentation of views.

Section 7131 of the Statute

As indicated above, both matters at issue pertain to section 7131 of the Statute (92 Stat. 1214), which reads as follows:

> § 7131. *Official time*
>
> (a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this [Statute] shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.
>
> (b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a nonduty status.
>
> (c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official

time for such purpose during the time the employee otherwise would be in a duty status.

(d) Except as provided in the preceding subsections of this section—

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this [Statute], any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

We turn to the application of the above-quoted provisions, and particularly section 7131(a), to the matters here in question. For convenience of discussion, we shall consider the questions in reverse order.

Nature of Negotiations to Which Official Time Applies

The second of the two matters at issue is the following:

> Whether the official time provisions of section 7131(a) of the Statute encompass all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement.

Section 7131(a) expressly states in relevant part that "[a]ny employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this [Statute] shall be authorized official

time for such purposes, including attendance at impasse proceeding[s]." This section thus provides that when an exclusive representative and an agency undertake the negotiation of a "collective bargaining agreement," an employee representing the exclusive representative in that undertaking must be authorized official time for such purposes.

In this connection, the phrase "collective bargaining agreement" in section 7131(a) is defined at section 7103(a)(8) (92 Stat. 1193), as follows:

> (8) "collective bargaining agreement" means an agreement entered into as a result of collective bargaining pursuant to the provisions of this [Statute].

The phrase, "collective bargaining," in turn, is defined in section 7103(a)(12) (92 Stat. 1194) as follows:

> (12) "collective bargaining" means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession[.]

It is apparent from the specific language in these definitions that a "collective bargaining agreement" is any agreement that is entered into as a result of the

performance of the mutual obligation of the parties to bargain in a good-faith effort to reach agreement with respect to conditions of employment affecting employees in the appropriate unit. Consequently, the language reflects the intent of Congress that the entitlement of official time under section 7131(a) would encompass all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement.

Such conclusion as to the intent of Congress is supported by the legislative history of section 7131(a) of the Statute. More particularly, section 7131(a) is identical to section 7132(a) of the Bill (H.R. 11280) reported to the House by the House Post Office and Civil Service Committee.[2] In adopting the provisions in section 7132(a) of the House Bill, Congress rejected the relevant language in section 7232 of the Bill (S. 2640) reported to the Senate by the Senate Governmental Affairs Committee.[3] That section of the

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[2] *See* H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 288 (1978).

[3] Section 7232 of the Senate Bill provided:

> Solicitation of membership or dues and other internal business of a labor organization shall be conducted during the nonduty hours of the employees concerned. Employees who represent a recognized labor organization shall not be on official time when negotiating an agreement with agency management, except that the negotiating parties may agree to arrangements which provide that the agency will authorize a reasonable number of such employees (not normally in excess of the number of management representatives) to negotiate on official time for up to 40 hours, or up to one-half the time spent in negotiations during regular working hours.

Senate Bill had sought, in effect, to maintain the restrictions imposed upon the use of official time for negotiations by employees representing unions as established in E.O. 11491, as amended.

Significantly, as to section 7232 of the Senate Bill, the Senate Committee Report had stated that it applied "to the negotiation or renewal of a *basic* collective bargaining agreement, *as opposed* to negotiations which arise out of circumstances during the term of the basic agreement" (emphasis added).[4] The House Bill which was adopted by Congress contains wholly different provisions on the relevant subject of official time, and there is no indication whatsoever that Congress intended to limit the use of official time to the negotiation of basic agreements as contemplated by the rejected language of the Senate Bill.

Thus, the legislative history demonstrates that Congress intended, consistent with the specific language of section 7131(a) and the related definitions in section 7103(a)(8) and (12), that the entitlement of official time under section 7131(a) would apply whenever the parties undertake the negotiation of a collective bargaining agreement.

Apart from the literal language and legislative history of section 7131(a) of the Statute, the conclusion that Congress intended that official time apply to the negotiation of any collective bargaining agreement is supported by the express findings and purpose of the Statute as stated in section 7101(a), namely, that "labor organizations and collective bargaining in the civil service are in the public interest." Certainly, it would implement the ends of collective bargaining to

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[4] S. Rep. No. 95-969, 95th Cong., 2d Sess. 112 (1978).

sanction official time for all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement. For only in such manner may effective union representation comparable to the representation of management be achieved under the Statute, and only in this manner may both parties effectively fulfill their respective obligations under section 7114(b) of the Statute (92 Stat. 1202) "to meet at reasonable times . . . as frequently as may be necessary" for good-faith negotiations on conditions of employment of the unit employees.

Accordingly, for the reasons stated above, it is concluded that the official time provisions of section 7131(a) of the Statute encompass all negotiations between an exclusive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement.

Entitlement of Employees on Official Time to Travel and Per Diem Expenses

As mentioned at the outset, the other matter here at issue is the following:

> Whether employees who are on official time under section 7131 of the Statute while representing an exclusive representative in the negotiation of a collective bargaining agreement are entitled to payments from agencies for their travel and per diem expenses.

On this issue it is clear from the Statute that employees who are on official time under section 7131 while representing an exclusive representative in the

negotiation of a collective bargaining agreement are entitled to payments from agencies for their travel and per diem expenses.

As previously set forth, section 7131(a), which is principally here involved, provides that an employee representing an exclusive representative in the negotiation of a collective bargaining agreement shall be on official time "during the time the employee otherwise would be in a duty status." As explained in the House Report, an employee serving as a union representative is authorized "paid time" while engaging in the negotiation activities provided for in section 7131 (a) of the Statute.[5] Hence, while an employee is on official time representing an exclusive representative in the negotiation of a collective bargaining agreement, that employee is on paid time entitled to his or her usual compensation and is not in leave status.

Neither the Statute, nor its legislative history, expressly adverts to the payment of travel expenses or per diem during participation in these negotiation activities.[6] However, it is well established that such

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[5] H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 58 (1978).

[6] Under section 20 of E.O. 11491, as amended, travel expenditures were not authorized for union representatives engaged in negotiation activities (*Labor-Management Relations in the Federal Service* (1975) at 58). However, as previously indicated, Congress substantially rejected section 7232 of the Senate Bill which sought in effect to maintain the language of the Order. Moreover, unlike under section 20 of the Order which strictly limited the amount of official time which might be authorized for negotiation activities by union representatives, section 7131(a) of the Statute contains no such limitation. Further, unlike under the Order, the encouragement of collective bargaining is a stated purpose of the Statute.

expenses are authorized when an employee "is engaged on official business for the Government" (Chapter 57, Subchapter I—*Travel and Subsistence Expenses; Mileage Allowances*, 5 U.S.C. § 5701, *et seq.*). As already mentioned, Congress, in adopting the Statute, specifically found in section 7101(a) that collective bargaining "contributes to the effective conduct of public business," and that "collective bargaining in the civil service [is] in the public interest." Further, Congress expressly mandated in sections 7114 and 7116(a)(5) and (b)(5) that such negotiations be conducted in good faith by the parties involved (92 Stat. 1202, 1204). Thus, an employee, while negotiating a collective bargaining agreement as a union representative and while on paid time entitled to his or her usual compensation and not in a leave status, is clearly engaged on "official business for the Government."

Additionally, it is not controverted that management representatives are uniformly paid travel expenses and per diem when engaged in the negotiation of a collective bargaining agreement on behalf of management, and Congress indicated its intent that similar prerogatives be accorded employees serving as union representatives likewise engaged in the negotiation of a collective bargaining agreement. In this connection, Representative Clay, in discussing the proscription of official time for employees engaged in internal union business under section 7132(b) of the House Bill (which was enacted as section 7131(b) of the Statute) stated as follows:[1]

> Section 7132(b) of the Udall compromise bars the use of official time for conducting the internal

[1] 124 Cong. Rec. H9,638 (daily ed. Sept. 18, 1978).

> business of a labor organization. . . . Activities that involve labor-management contacts are not included in this section. . . . Title VII imposes heavy responsibilities on labor organizations and on agency management. These organizations should be allowed official time to carry out their statutory representational activities *just as* management uses official time to carry out its responsibilities. [Emphasis added.]

The payment of travel and per diem expenses would not only more nearly equate the status of union and management negotiators as contemplated by Congress, but would also facilitate more effective union representation at the bargaining table, thereby implementing the purpose of the Statute, as reflected in section 7101(a), to encourage collective bargaining in the Federal sector.

Finally, it should be noted that section 7131(c) of the Statute, identical as here relevant to section 7131(a), provides that:

> (c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority *shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.* [Emphasis added.]

The Authority has previously interpreted this language of the Statute in section 2429.13 of its Interim Rules and Regulations, as entitling the employee on such official time to transportation and per diem expenses (44 Fed. Reg. 44771 (July 30, 1979)). No persuasive reason has been advanced for a contrary

interpretation of the analogous language in section 7131(a) of the Statute, and no supported challenge has been advanced regarding the legality of the Authority's prior interpretation of the same critical language in section 7131(c).

In summary, any employee who is on official time under section 7131 of the Statute while representing an exclusive representative in the negotiation of a collective bargaining agreement is entitled to payments from agencies for their duty time and travel and per diem expenses.

Impact of Savings Provisions in the Statute

Lastly, the question as to the impact, if any, of the savings provisions in section 7135(a)(1) of the Statute on the above matters must be considered.[8] More specifically, the question is whether provisions in existing agreements which are more restrictive than section 7131(a) on the granting of official time, as well as the payment of travel and per diem expenses, for employees representing a union in the negotiation of a collective bargaining agreement, remain operative under section 7135(a)(1) of the Statute.

Section 7135(a) reads in relevant part as follows:

> (a) Nothing contained in this [Statute] shall preclude—
>
> (1) the renewal or continuation of . . . a lawful agreement between an agency and an exclusive

---

[8] The savings clause in section 7135(b) of the Statute (92 Stat. 1215) is clearly without impact, since the provisions of section 7131(a), which are here involved, are completely different from the related provisions in section 20 of E.O. 11491, as amended, and section 7131(a) thereby "supersedes" the "policies, regulations, and procedures established under" the Executive Order.

representative of its employees, which is entered into before the effective date of this [Statute][.]

By this express language of section 7135(a)(1), nothing in the Statute precludes the parties to a lawful agreement in existence on January 11, 1979, the effective date of the Statute, from mutually renewing or continuing the terms of that agreement if they so desire. Thus, for example, if the provisions of an existing agreement limit the authorization of official time to employee representatives of a union in the negotiation of a basic collective bargaining agreement, nothing in the Statute precludes the parties to such an existing agreement, if they wish, from mutually renewing or continuing the terms of that agreement.

However, where a labor organization or an agency objects to the continuation or renewal of a provision relating to official time more restrictive than section 7131(a), such objection prevents the continuation or renewal of the agreement provision under section 7135(a)(1) of the Statute. In that situation, the provisions of section 7131(a) would be immediately operative. That is, any employee representing an exclusive representative in the negotiation of a collective bargaining agreement would be entitled to official time, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement, and any employee on such official time under section 7131(a) of the Statute would be entitled to payments from the agency for their travel and per diem expenses.

Conclusion

It is the Authority's interpretation and guidance that:

1. The official time provisions of section 7131(a) of the Statute encompass negotiations between an exclu-

sive representative and an agency, regardless of whether such negotiations pertain to the negotiation or renegotiation of a basic collective bargaining agreement.

2. Employees who are on official time under section 7131 of the Statute while representing an exclusive representative in the negotiation of a collective bargaining agreement are entitled to payments from agencies for their duty time and travel and per diem expenses.

3. Provisions in agreements existing on January 11, 1979, the effective date of the Statute, which are more restrictive than section 7131(a) of the Statute on the granting of official time, as well as the payment of travel and per diem expenses, for employees representing a union in the negotiation of a collective bargaining agreement may be renewed or continued if the parties so desire, under section 7135(a)(1) of the Statute. However, if either party to such provisions in an existing agreement objects to the continuation or renewal thereof, such objection prevents the continuation or renewal of those agreement provisions under section 7135(a)(1) of the Statute.

Issued, Washington, D.C., December 19, 1979.

/s/ Ronald W. Haughton
RONALD W. HAUGHTON, Chairman

/s/ Henry B. Frazier III
HENRY B. FRAZIER III, Member

/s/ Leon B. Applewhaite
LEON B. APPLEWHAITE, Member

FEDERAL LABOR RELATIONS
AUTHORITY

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In the Supreme Court of the United States

OCTOBER TERM, 1982

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY AND
NATIONAL TREASURY EMPLOYEES UNION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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In the Supreme Court of the United States

OCTOBER TERM, 1982

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS, PETITIONER,

v.

FEDERAL LABOR RELATION AUTHORITY AND NATIONAL TREASURY EMPLOYEES UNION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE FEDERAL LABOR RELATIONS AUTHORITY

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1. A unanimous panel of the United States Court of Appeals for the Ninth Circuit enforced an order of the Federal Labor Relations Authority ("Authority" or "FLRA") finding that the Bureau of Alcohol, Tobacco and Firearms, Western Region, Department of the Treasury, San Francisco, California ("ATF") had committed unfair labor practices in violation of section 7116(a)(1) and (8) of the Federal Service Labor-Management Relations Statute (the "Labor-Management Statute"), 5 U.S.C. (Supp. V) 7101 *et seq.*[1] (Petit. App. A, 1a-11a and Petit. App. B,

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[1] 5 U.S.C. (Supp. V) 7116(a)(1) and (8) provides:

§ 7116. Unfair labor practices

(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

. . . .

(8) to otherwise fail or refuse to comply with any provision of this chapter.

12a-13a). The basis for the Authority ruling was that ATF had failed and refused to comply with 5 U.S.C. (Supp. V) 7131(a)[2] by denying Donald Pruett, an ATF employee who represented the National Treasury Employees Union, Chapter 81 (the "union"), official (i.e., paid) time and necessary travel and per diem during union-agency negotiations on the impact and implementation of ATF's decision to move its Lodi, California, area office to Sacramento, and to establish a reduced duty post in Lodi (Petit. App. D, 20a-34a). The Authority ordered ATF to cease and desist from such practices and to take appropriate affirmative action (*id.* at 16a-17a).

2. The Authority's order adopted a decision and order of an Administrative Law Judge (Petit. App. D, 15a-17a) and was based upon an earlier Interpretation and Guidance issued by the Authority (2 F.L.R.A. No. 31; Petit. App. E, 35a-47a). In its Interpretation, the Authority concluded, as relevant to this petition, that employees on official time under 5 U.S.C. (Supp. V) 7131(a) while representing a union in negotiating a collective bargaining agreement with an agency are entitled to payment from that agency for their travel expenses and per diem.[3]

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[2] 5 U.S.C. (Supp. V) 7131(a) provides:

§ *7131. Official time*

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

[3] The Authority in its Interpretation also concluded that the official time provision of 5 U.S.C. (Supp. V) 7131(a) applies to the negotiation of any collective bargaining agreement between the parties (including mid-term negotiations), not merely negotiations of a "basic" agreement. The court of appeals also af-

In support of its conclusion, the Authority specifically noted Congress' express rejection of attempts to incorporate the restrictive official time policies of Executive Order 11491, as amended, *reprinted in* 5 U.S.C. (Supp. V) 7101 note at 312, under which payment of travel expenses and per diem was not authorized, into the Labor-Management Statute (Petit. App. E, 42a n.6). In this regard, the Authority pointed out that the official time provisions under 5 U.S.C. (Supp. V) 7131(a) are completely different from those of the rejected Senate bill, which sought to maintain the language of the official time provisions under the Executive Order. Thus, unlike under the Executive Order which strictly limited the amount of official time which might be authorized for negotiation activities by employee union representatives, section 7131(a) contains no such limitation. As explained by the House Report, such employee is on "paid time" and entitled to his or her usual compensation. H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 58 (1978) (*id*). The Authority further explained that unlike under the Executive Order, the encouragement of collective bargaining is a stated purpose of the Labor-Management Statute (*id.* at 42a).

Additionally, the Authority emphasized that, under the Labor-Management Statute, employees participating in negotiation activities pursuant to 5 U.S.C. (Supp. V) 7131(a) are engaged on official government business and are therefore authorized payment of travel and per diem expenses, under 5 U.S.C. (Supp. V) 5701 *et seq.* (*id.* at 43a). The Authority concluded that its determination that such employees are engaged on "official business for the Government" is compelled because of Congress' specific finding that collective bargaining is in the public interest and contributes to the effective

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firmed this conclusion of the Authority. This aspect of the court's decision is not challenged in ATF's petition for a writ of certiorari (Pet. 9 n.7).

conduct of public business, and from the statutory requirement that parties conduct their negotiations in good faith, including meeting at reasonable times and convenient places as frequently as may be necessary. *See* 5 U.S.C. (Supp. V) 7101(a), 7114, 7116(a)(5) and (b)(5) (*id.*).

Moreover, as explained by the Authority, the payment of travel expenses and per diem also implements Congress' intent more nearly to equate the status of union and management negotiators. Reducing this inequality facilitates more effective union representation at the bargaining table, which in turn encourages collective bargaining and contributes to the effective conduct of public business. 5 U.S.C. (Supp. V) 7101(a). In this connection, the Authority stated that agencies uniformly pay travel expenses and per diem for management negotiators, and Congress indicated in the legislative history that similar prerogatives are to be accorded employees serving as union negotiators under 5 U.S.C. (Supp. V) 7131(a) (*id.* at 43a-44a).[4]

Finally, as the Authority pointed out, it had previously interpreted language in section 7131(c), identical to the pertinent language in 7131(a), as entitling employees on official time in Authority proceedings to travel and per diem expenses. Section 2429.13 of the Authority's regulations, 5 C.F.R. 2429.13 (1982). The Authority stated that no persuasive reason had been

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[4] The Authority quoted the following statement of Congressman Clay (124 Cong. Rec. 29188 (1978)):

> Section 7132(b) of the Udall compromise bars the use of official time for conducting the internal business of a labor organization.... Activities that involve labor-management contacts are not included in this section.... Title VII imposes heavy responsibilities on labor organizations and on agency management. These organizations should be allowed official time to carry out their statutory representational activities *just as* management uses official time to carry out its responsibilities. (Emphasis in Interpretation.)

advanced for a contrary interpretation of the analogous language in 7131(a), and no supported challenge had been advanced regarding the legality of the Authority's prior interpretation of the same critical language in 7131(c) (*id.* at 44a-45a).

For these reasons, the Authority determined in its Interpretation that employees on official time under section 7131a while representing an exclusive representative in collective bargaining agreement negotiations are entitled to payments from their agencies for travel and per diem expenses.

3. The court of appeals affirmed, concluding (Petit. App. A, 11a):

> The FLRA's Interpretation and Guidance is reasoned and supportable, and therefore will be given deference by this Court. The FLRA, acting in its own area of expertise, has interpreted the relevant language of Title VIII [the Labor-Management Statute] in a clearly defensible manner, and we are neither permitted not inclined to substitute a different judgment.

Moreover, the panel unanimously denied petitioner's petition for rehearing and rejected the suggestion of a rehearing in banc. In addition, no judge of the full court requested a vote on the suggestion for rehearing in banc (Petit. App. C, 14a).

4. The court of appeals applied the correct standard of review to the Authority's Interpretation regarding the payment of travel expenses and per diem under 5 U.S.C. (Supp. V) 7131(a). In this regard, the court recognized that the Authority acted well within its own area of expertise in determining that Congress intended employee union negotiators to be engaged on official government business while on official time under 5 U.S.C. (Supp. V) 7131(a). As the court stated: "The FLRA's determination that union negotiators are entitled to travel expenses and a per diem is based largely on its finding that section 7131(a) authorized official

time" for collective bargaining negotiations (Petit. App. A, 9a). Moreover, the court's discussion (*id.* at 9a-10a) makes it clear that the Authority's ruling, that employees serving as labor representatives in collective bargaining negotiations are on official government business, is based on the Authority's analysis of the Labor-Management Statute and its legislative history and purpose.

Further, with respect to the standard of review, the court correctly held that:

> Review of a decision of the FLRA shall be on the record in accordance with 5 U.S.C. § 706, *see* 5 U.S.C. § 7123(c), and the agency's action shall be set aside only if arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. *Id.* § 706(2)(A). In the case at bar, if the FLRA's Interpretation and Guidance is found to be a reasonable interpretation of the law, the FLRA decision is clearly not arbitrary and capricious.

(*Id.* at 4a). The court further stated that the weight given such an Interpretation on judicial review will depend on "the thoroughness evident in [its] consideration, the validity of the reasoning, and [its] consistency with earlier and later pronouncements. *Skidmore v. Swift & Co.*, 323 U.S. 124, 140 (1944)." (Petit. App. A, 4a-5a.) Indeed, the court specifically recognized the principle asserted by petitioner (Pet. 18a); namely that "an agency should not be permitted to usurp congressional authority to make major policy decisions. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 497 (1979)." (Petit. App. A, 5a.)

After setting forth in detail the applicable standard of review and the limitation on the policy of deference to an agency's ruling, the court proceeded to analyze the relevant language, legislative history, and purpose of the Labor-Management Statute and thereupon properly determined that the Authority's Interpretation is

reasoned and supportable and should be enforced (*id.* at 5a-11a).

In reaching its conclusion, the court took cognizance of a point specifically acknowledged by the Authority—namely, that "neither the statutory language nor the legislative history expressly refers to this question [of travel and per diem expenses]" (*id.* at 9a). The court then proceeded to set forth several factors relating to the objective of the Labor-Management Statute that, according to the court, "nevertheless appear to indicate that these expenses are authorized" (*Id.*).

Among other factors, the panel discussed section 7101(a)(1)(B) of the Labor-Management Statute, "in which Congress stated that collective bargaining in the civil service contributes to the effective conduct of public business. Thus, it appears that labor representatives should be treated similarly to other government employees conducting business for the government" (*id.*). Further, the panel approved "the FLRA's effort to equalize the positions of the parties to collective bargaining negotiations" as consistent with congressional intent in enacting the Labor-Management Statute (*id.* at 10a). Thus, upon consideration of the congressional purpose of the Labor-Management Statute and the Authority's role "to provide leadership in establishing policies and guidelines and to take responsibility for carrying out the purpose" of the Labor-Management Statute (5 U.S.C. (Supp. V) 7105(a)(1)) [*id.* at 4a], the court properly affirmed the Authority's decision and granted enforcement of its order.

5. The Authority believes that the decision of the court below is correct. The Authority recognizes, however, that the decision conflicts with recent decisions of the Second and Eighth Circuits. *See Division of Military & Naval Affairs v. FLRA*, 683 F.2d 45, *rehearing denied* (2d Cir. Sept. 17, 1982); *Department of Agriculture v. FLRA*, No. 81-1948 (Aug. 9, 1982), *rehearing*

denied (8th Cir. Sept. 14, 1982).[5] The issue is an important and recurrent one. Indeed, other cases are pending in the Eleventh and District of Columbia Circuits. *See, e.g., Florida National Guard v. FLRA*, No. 81-5466 (11th Cir. argued Sept. 1, 1982); *Bureau of the Mint and United States Customs Service v. FLRA*, Nos. 82-1194, 82-1195 (D.C. Cir. filed Feb. 24, 1982). It is necessary, therefore, that the existing uncertainty as to the statutory entitlement, under 5 U.S.C. (Supp. V) 7131(a), of employee union representatives in these circumstances to travel expenses and per diem from their employing agencies be eliminated, and that the conflict among the courts of appeals be resolved as soon as possible.

Accordingly, the Authority does not oppose granting the present petition.[6]

Respectfully submitted,

STEVEN H. SVARTZ
Acting Solicitor

ELLEN STERN
Attorney

DECEMBER 1982

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[5] In both these cases, the petition for review was granted and enforcement of the Authority's order denied in 2-1 decisions, with separate dissenting opinions.

[6] The Solicitor General has authorized the filing of this memorandum.

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No. 82-799

IN THE

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BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY AND
NATIONAL TREASURY EMPLOYEES UNION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL TREASURY EMPLOYEES UNION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-799

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY AND
NATIONAL TREASURY EMPLOYEES UNION

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE NATIONAL TREASURY EMPLOYEES UNION

INTRODUCTION

On November 10, 1982, the Bureau of Alcohol, Tobacco and Firearms ("ATF") petitioned for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case. The opinion of the Court of Appeals is reported at 672 F.2d 732, and is appended to the petition (App. D at 15a-34a).

It is the position of the respondent National Treasury Employees Union ("NTEU" or "union") that the Ninth Circuit decision is correct and should be affirmed.

However, because of the importance and the recurring nature of the issue presented in this case, NTEU does not oppose the ATF petition. A division among the Circuits now exists over this important question, causing uncertainty and confusion for all participants in federal government labor management relations. Resolution of this fundamental question by this Court will be of benefit to labor and management alike.

STATEMENT

1. This case arose when ATF decided to move its Lodi, California Area Office to Sacramento, and to establish a smaller Lodi post of duty at a different location in Lodi (Pet. App. 22a).[1] As a result of the relocation, nine employees were required to move to Sacramento (Jt. Ex. 1).[2] Pursuant to the Federal Service Labor Management Relations Statute, 5 U.S.C. (Supp. V) 7101 *et. seq.*, ATF exercised its management right to decide whether or not to move its office. ATF was not required to negotiate with the union over its decision to relocate offices. The Statute only obliged ATF to negotiate over the procedures it would follow in executing the relocation. 5 U.S.C. (Supp. V) 7106(b)(2), (*e.g.*, job assignment of moving employees, parking facilities, adjustment to new commuting schedules). It was in the negotiation between ATF and NTEU of the related procedures that the dispute surfaced.

ATF management was represented by four negotiators whereas NTEU had one employee representative (Pet.

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[1]Citations to the Appendix to the Petition shall be referred to as "Pet. App.____".

[2]Joint Exhibits shall be denoted "Jt. Ex.," and refer to exhibits introduced at the February 27, 1980 hearing before the Federal Labor Relations Authority ("FLRA" or "Authority") Administrative Law Judge.

App. 22a-24a). In connection with the negotiation, the parties traveled to Sacramento and Lodi to view the new facilities (Pet. App. 23a, 24a). All four ATF management officials received "official time" (*i.e.*, pay) and travel expenses to negotiate. ATF refused official time and travel expenses for the single union representative. ATF required the union representative to take annual leave (personal vacation time) to participate in the bargaining, and to pay his own travel expenses (Pet. App. 23a). To participate in the negotiation the single federal employee union representative drove his automobile approximately 303 miles from his home in Madera, California, to Sacramento, California, to Lodi, California, and then back home (Pet. App. 25a n. 7).

2. NTEU filed an unfair labor practice charge with the General Counsel of the Federal Labor Relations Authority. NTEU challenged the ATF practice of denying official time and travel expenses to the union negotiator, while granting both time and travel expenses to all four management representatives involved in the same collective bargaining. On January 29, 1980, the FLRA General Counsel issued a complaint and notice of hearing alleging that ATF committed unfair labor practices in violation of Sections 7116(a)(1) and (8) of the Statute. On February 27, 1980, a hearing was held before an FLRA Administrative Law Judge ("ALJ").

On May 12, 1980, the judge issued his recommended decision and order (Pet. App. D, 20a-34a). The ALJ concluded that ATF committed unfair labor practices contrary to Sections 7116(a)(1) and (8). He ruled that 5 U.S.C. Section 7131(a), which requires that employees receive "official time" for negotiating collective bargaining agreements, obligated ATF to grant the NTEU representative official time and travel expenses incident to the

negotiations. In so ruling, the ALJ based his decision upon the Authority's prior *Interpretation and Guidance,* 2 FLRA No. 31, 2 FLRA 265 (December 19, 1979) (Pet. App. E, 35a-47a).

On September 29, 1980, the Authority issued it final decision and order in this case (Pet. App. D, 15a-34a). The FLRA affirmed the ALJ decision that ATF violated Sections 7116(a)(1) and (8). The Authority relied upon its previously issued *Interpretation and Guidance, supra,* and adopted the ALJ's findings, conclusions and recommendations.

3. The FLRA issued the *Interpretation and Guidance, supra,* centrally involved in this appeal, in response to obvious uncertainty in the federal labor-management community over whether Section 7131(a) automatically granted time to union negotiators for mid-term negotiations, and whether union negotiators were entitled to travel expenses from their agencies. The Authority recognized the importance of these questions, and decided to address them through an interpretative rule, styled an "Interpretation and Guidance" in the FLRA regulations. *See* 5 C.F.R. Sections 2427.1-2427.5. The FLRA announced its intent in a *Federal Register* notice at 44 *Fed. Reg.* 42788 (July 20, 1979). After considering the comments of all interested persons the FLRA issued its final decision on December 19, 1979, addressing both issues[3] (Pet. App. E, 35a-47a).

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[3]Regarding mid-term bargaining, the FLRA decided that Section 7131(a) required official time for employee representatives. Therefore, 100% official time is available for mid-term "impact" bargaining, as well as for master contract ("term") negotiations. This ruling was affirmed by the Ninth Circuit below, and ATF does not contest that aspect of the decision in its Petition (Pet. at 9 n.7).

It was in this *Interpretation and Guidance* ruling that the FLRA articulated its rationale for requiring that Federal employees negotiating on behalf of unions be paid travel expenses in the same way as agency management negotiators. The FLRA first observed that the legislative history of Section 7131(a) indicated that Congress intended union negotiators to be authorized the equivalent of "paid time" when negotiating.[4] Union negotiators were entitled to their usual compensation, including all fringe benefits, as if they were in a duty status (Pet. App. 42a).

The FLRA also recognized that, like Executive Order No. 11491, as amended,[5] which preceeded it, the Statute lacks a specific provision answering the travel expense question. The Order had been construed not to authorize travel expenses for union negotiators.[6] However, the legislative history of the Statute shows that a Senate version of Section 7131(a) identical to the pertinent provision of the Order was rejected.[7] The rejected Senate language would have continued the strict Executive Order prohibitions against official time for union negotiators. The House language, which was enacted as Section 7131(a) of the Statute, directly reversed the Order's rule – instead of generally prohibiting time for employee representatives to negotiate, 100% official time was mandatory (Pet. App 42a n. 6).

The FLRA also relied upon the Statute's explicit endorsement of collective bargaining as in the public interest, and as promoting government efficiency. *See* 5

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[4]H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 58 (1978).

[5]Exec. Order No. 11491, as amended, is reprinted in 5 U.S.C. (Supp. V) 7101 note at 312.

[6]44 Comp. Gen. 617 (1965).

[7]Section 7232 of S. 2640. *See also* S. Rep. No. 95-969, 95th Cong., 2d Sess. 112 (1978).

U.S.C. (Supp. V) 7101(a). This was in sharp contrast to the Order, which did not encourage collective bargaining, or recognize collective bargaining as in the public interest. Indeed, the term "collective bargaining" did not appear in the Order.

In addition, the FLRA explicitly recognized that under the Order management negotiators uniformly had their travel expenses paid, whereas union negotiators did not. One of the purposes of the Act was to "more nearly equate" labor and management in these important areas[8] (Pet. App. 43a, 44a).

Having decided that union negotiators are on "official time," the FLRA then applied the authorization contained in 5 U.S.C. (Supp. V) 5701 *et. seq.* that travel expenses be paid to employees "engaged in official business for the government." Under the new law, then, travel expenses are authorized for employee negotiators because such employees are on "paid time," participating in a process that improves government efficiency, is in the public interest, and is a major purpose of the Act – collective bargaining (Pet. App. 43a).[9]

4. ATF challenged the final FLRA decision in the subject case (4 FLRA No. 40) (Pet. App. D, 15a-34a) by an appeal to the U.S. Court of Appeals for the Ninth Circuit. ATF contested both issues addressed in the *Interpretation and Guidance, supra* (Pet. App. E, 35a): a) whether Section 7131(a) of the Statute provides official time for union negotiators participating in mid-term negotiations; and b) whether Section 7131(a) obligates Federal agencies to pay

[8]124 *Cong. Rec.* 29188 (1978).

[9]The FLRA also observed that the new law placed enlarged responsibilities on exclusive representatives. Provision of travel expenses to union negotiators would ease this new burden and further the overriding purposes of the law.

the travel expenses for employees negotiating on behalf of unions.

A unanimous panel of the Ninth Circuit dismissed the ATF petition on both issues, and enforced the FLRA order holding that ATF committed unfair labor practices in violation of Section 7116(a)(1) and (8) of the Statute (Pet. App. A, 1a-11a). The panel also unanimously denied ATF's petition for rehearing, and rejected the suggestion of a rehearing en banc with no judge of the full court requesting a vote on the suggestion for rehearing en banc (Pet. App. C, 14a).

In unanimously affirming the FLRA, the Ninth Circuit applied the proper standard of review (Pet. App. A, 4a, 5a). Under 5 U.S.C. (Supp. V) 7123(c) the FLRA decision may be set aside only if arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. The Court below correctly recognized that the FLRA *Interpretation and Guidance, supra,* upon which 4 FLRA No. 40 is squarely based, was an interpretative rule. As such it is entitled less weight on review than rules formally promulgated pursuant to Congressionally delegated rulemaking authority. *General Electric Co. v. Gilbert,* 429 U.S. 125, 141 (1976). Consequently the Ninth Circuit scrutinized the Interpretation and Guidance and accorded it only the deference deserved by virtue of its decision and rationale. *See Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944). Expressly recognizing that an agency cannot "usurp Congressional authority" to make policy (*Ford Motor Co., v. NLRB,* 441 U.S. 488, 497 (1979)), the Court upheld the FLRA decision as a "reasoned and supportable" interpretation of the law the FLRA is charged to enforce (Pet. App. A, 5a).

ATF argues that the FLRA *Interpretation and Guidance* should not receive the normal deference accorded to administrative agencies construing their enabling act,

because the FLRA relied upon 5 U.S.C. (Supp. V) 5702 in its decision (Pet. at 18). Section 5702, not a part of the Civil Service Reform Act, is the statutory provision which authorizes the federal government to pay for travel expenses incident to official government business. However, the Ninth Circuit correctly recognized that the FLRA's conclusion that federal employees negotiating for unions are entitled to travel expenses is based upon the intent of Congress when enacting the Statute, not 5 U.S.C. (Supp. V) 5702. Although the FLRA did cite Section 5702 in its *Interpretation and Guidance,* the legal basis for paying travel expenses to union negotiators is derived from the new Statute where Congress concluded that participation in collective bargaining promotes efficient government, and is the equivalent of official government business. *See* 5 U.S.C. (Supp. V) 7101(a) and 7131(a). Once this legislative intent is established, 5 U.S.C. (Supp. V) 5702 authorizes payment of travel expenses to negotiators in the same ministerial fashion as for travel incident to any other official government business (Pet. App. A, 10a).

In addition, the Court below also properly concurred in the FLRA reading of Congressional intent that past inequities between labor and management in federal government labor relations be rectified. Under Executive Order No. 11491, as amended, management negotiators routinely received 100% "official time" (full salary) to negotiate, plus complete reimbursement for necessary travel expenses incident to negotiations. *Interpretation and Guidance, supra* at 269 (Pet. App. E, 43a; Pet. App. A, 10a). In contrast, union negotiators received only one-half their salary for time spent negotiating, and received no travel expense reimbursement from their employing federal agency.[10] In affirming the FLRA, the Ninth Circuit correctly observed

[10] *See* Exec. Order No. 11491, as amended, Section 20.

that the new Statute had as one of its purposes to foster collective bargaining, subject to strict management rights, and to more nearly equalize the positions of labor and management in the bargaining process[11] (Pet. App. A, 10a, 11a). By explicitly finding that collective bargaining in the federal government is in the public interest and promotes efficient government,[12] negotiators for agency management and labor alike perform official government business when participating in collective bargaining. 5 U.S.C. (Supp. V) 7101(a) and 7131(a). Therefore, any travel by labor or management negotiators, incident to collective bargaining, must be reimbursed.

The Ninth Circuit's opinion affirming the Authority is correctly decided and should be affirmed. The Ninth Circuit properly deferred to the FLRA's expertise in handling an issue of this complexity and magnitude, since it arises directly within the ambit of FLRA knowledge and responsibility in administering the new law. 5 U.S.C. (Supp. V) 7105(a)(1).

NTEU DOES NOT OPPOSE THE PETITION

NTEU shares many of the practical problems ATF voices in its petition, resulting from the split among the Circuits on this issue,[13] Owing to the importance of this

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[11]The need for equalization is especially clear in the case at bar where ATF was represented by four management negotiators, whereas the union was represented by a single federal employee (Pet. App. D, 23a, 24a).

[12]*See* 5 U.S.C. (Supp. V) 7101(a).

[13]Unlike the Ninth Circuit, the Second and Eighth Circuits have issued decisions reversing the FLRA travel expense ruling. *See Division of Military & Naval Affairs v. FLRA*, 683 F.2d 45 (1982), rehearing denied (2nd Cir. Sept. 17, 1982); *Dept. of Agriculture v. FLRA*, No. 81-1948 (Aug. 9, 1982), rehearing denied (8th Cir. Sept. 14, 1982). Both decisions were 2-1, with separate dissenting opinions.

issue for collective bargaining in federal labor management relations, and because of the problems caused by the split among the Circuits, NTEU does not oppose the ATF petition.

The division among the three Circuits that have decided this issue is causing confusion and uncertainty throughout the federal government. The question whether travel expenses shall be paid for union negotiators arises repeatedly throughout the nation, whenever a union representative travels to participate in collective bargaining. Considerable uncertainty now exists over what the law is, especially in those judicial Circuits where this issue has not yet been decided. Even when the issue has been decided, the geographical reach of the decision remains uncertain as long as the split of authority exists. Travel to negotiations outside the geographical limits of the Ninth Circuit, for example, might raise a question whether the Ninth Circuit rule governs.

The issue presented in the ATF petition is a recurring one. Unless this Court resolves the issue, it will unquestionably be litigated to decision in all judicial Circuits, an unnecessary expenditure of judicial resources. Continued litigation in every Circuit is also likely to compound the current uncertainty and confusion over what the law is, contrary to the interests of all concerned parties throughout the government.

Finally, the issue is an important one. At present, employees of the same agency are treated differently depending on where they happen to live and work. Moreover, in addition to the substantial monies at stake (Pet. at 13 n.12), which the union does not dispute, final resolution of the issue will have a major long-term impact on the character of the collective bargaining process in the federal government. As of November 1, 1981, 1,234,256

federal employees were included in units of exclusive recognition.[14] The decision of this Court will have a direct impact on the ability of the labor unions representing these employees to effectively discharge their collective bargaining duties under the Statute.

Respectfully submitted,

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[14] *Union Recognition In The Federal Government,* U.S. Office of Personnel Management (November, 1981).

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No. 82-799

In the Supreme Court of the United States

OCTOBER TERM, 1982

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. V) 7131(a), requires that a federal agency pay a per diem allowance and travel expenses to employee union representatives engaged in collective bargaining with the agency.

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In the Supreme Court of the United States

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 672 F.2d 732. The ruling of the Federal Labor Relations Authority (Pet. App. 15a-34a) is reported at 4 F.L.R.A. No. 40.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1982 (Pet. App. 12a-13a), and a timely petition for rehearing was denied on July 13, 1982 (Pet. App. 14a). On October 1, 1982, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to and including November 10, 1982. The petition was filed on that date and was granted on January 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

5 U.S.C. (Supp. V) 7131 provides:

(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status.

(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

(d) Except as provided in the preceding subsections of this section—

(1) any employee representing an exclusive representative, or

(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

5 U.S.C. (Supp. V) 5702(a) provides:

> Under regulations prescribed under section 5707 of this title, an employee while traveling on official business away from his designated post of duty, or in the case of an individual described under section 5703 of this title, his home or regular place of business, is entitled to (1) a per diem allowance for travel inside the continental United States at a rate not to exceed $50, and (2) a per diem allowance for travel outside the continental United States, that may not exceed the rate established by the President, or his designee, for each locality where travel is to be performed. For travel consuming less than a full day, such rate may be allocated proportionately.

5 U.S.C. 5707(a) provides:

> The Administrator of General Services shall prescribe regulations necessary for the administration of this subchapter, except that the Director of the Administrative Office of the United States Courts shall prescribe such regulations with respect to official travel by employees of the judicial branch of the Government.

STATEMENT

1. In October 1978, Congress enacted the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 ("the Act"). Title VII of the Act (5 U.S.C. (Supp. V) 7101 *et seq.*) governs labor-management relations, including collective bargaining, for nearly all federal agencies.[1] Title VII replaced the federal labor relations

[1] Certain federal employees, including members of the uniformed services and the Foreign Service, and certain agencies, including the General Accounting Office, Federal Bureau of Investigation, Central Intelligence Agency, and National Security Agency, are excluded from the coverage of Title VII. See 5 U.S.C. (Supp. V) 7103(a)(2) and (3). United States Postal Service employees also are excluded from Title VII coverage, since labor relations matters involving those employees are within

program created in 1962 by Exec. Order No. 10988, 3 C.F.R. 521 (1959-1963 Compilation).[2]

Title VII protects the right of federal employees "to form, join, or assist any labor organization, or to refrain from any such activity" (5 U.S.C. (Supp. V) 7102), and it establishes a duty to bargain collectively in good faith. See 5 U.S.C. (Supp. V) 7116(a)(5) and (b)(5). The statute also outlines the matters subject to the bargaining obligation. See 5 U.S.C. (Supp. V) 7103(a)(12) and (14), 7117. Certain management rights are excluded from the scope of bargaining. 5 U.S.C. (Supp. V) 7106. However, an agency must negotiate with a recognized union over procedures the agency will follow in exercising its reserved management rights. 5 U.S.C. (Supp. V) 7106(b)(2). The provisions of Title VII are to be read "in a manner consistent with the requirement of an effective and efficient Government." 5 U.S.C. (Supp. V) 7101(b).

The Act establishes the Federal Labor Relations Authority ("FLRA" or "Authority") as a three-member independent body within the Executive Branch with responsibility for supervising the federal collective bargaining process under Title VII.[3] FLRA activities include adjudication of negotiability disputes, unfair labor practice complaints, bargaining unit issues, and arbitration exceptions, conduct of elections, and rulemaking. See 5 U.S.C. (Supp. V) 7105(a)(2)(A)-(I). The

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the jurisdiction of the National Labor Relations Board. See 39 U.S.C. 1209.

[2] The executive order program was revised and continued by Exec. Order No. 11491, 3 C.F.R. 861 (1966-1970 Compilation), as amended by Exec. Orders Nos. 11616, 11636, and 11838, 3 C.F.R. 605, 634 (1971-1975 Compilation) and 3 C.F.R. 957 (1971-1975 Compilation).

[3] The FLRA replaced the Federal Labor Relations Council, which had similar responsibilities under the executive order program.

FLRA has the authority to issue orders against unfair labor practices (5 U.S.C. (Supp. V) 7118) and to seek enforcement of those orders in appropriate United States courts of appeals (5 U.S.C. (Supp. V) 7123(b)). Persons, including federal agencies, who are aggrieved by any final FLRA order may seek judicial review in the courts of appeals. 5 U.S.C. (Supp. V) 7123(a).

2. This case concerns the proper interpretation of 5 U.S.C. (Supp. V) 7131(a), which provides that federal agencies must grant "official time" to employee negotiators who represent their union in collective bargaining with the agency during hours they would otherwise be in a duty status. A grant of official time allows employee union representatives to be paid as if they were at work, without being charged for annual leave. Under the original Exec. Order No. 10988, granting of official time for employee union representatives was solely within an agency's discretion. See 3 C.F.R. 521, 524-525 (1959-1963 Compilation); *United States Dep't of Agriculture* v. *FLRA*, 691 F.2d 1242, 1243-1244 & n.2 (8th Cir. 1982), petition for cert. pending, No. 82-979 (filed Dec. 13, 1982). The original executive order did not mention employee union representatives' travel expenses and per diem allowances in connection with negotiations. *Id.* at 1243-1244.

In 1965, the Comptroller General determined that Exec. Order No. 10988 did not permit payment of union travel costs or overtime compensation for collective bargaining. See 44 Comp. Gen. 617, 618. The Comptroller General reasoned that although collective bargaining may contribute to the effective conduct of public business, employee union representatives could not be said to be conducting official business during negotiations. Rather, the negotiating activities of such representatives were primarily in the interest of the employee organization they represented. *Ibid.*

The Comptroller General subsequently modified this absolute prohibition. See 46 Comp. Gen. 21, 21-22 (1966). Although the Comptroller General concluded that as a general rule federal agencies should not pay travel expenses for employee bargaining agents who attended negotiation sessions, he determined that such expenses could be paid if, consistent with new Civil Service Commission guidelines, an agency head certified that the employee representatives' travel would be in the primary interest of the government. *Ibid.* For example, an agency might find that it would be in the primary interest of the government to meet at a particular site and that it would be more economical to pay travel costs for employee union representatives than to pay such costs for agency representatives to travel to a different site. *Ibid.*

In 1970, Exec. Order No. 11491 superseded Exec. Order No. 10988. The new order originally stated flatly that federal employees representing a union in negotiations with management could not receive official time for negotiations. See 3 C.F.R. 861-862, 873-874 (1966-1970 Compilation); *United States Dep't of Agriculture* v. *FLRA*, *supra*, 691 F.2d at 1244. In 1971, following a review of the federal labor relations program, Exec. Order No. 11491 was amended by Exec. Order No. 11616. See 3 C.F.R. 605 (1971-1975 Compilation); *United States Dep't of Agriculture* v. *FLRA*, *supra*, 691 F.2d at 1244. The amendment allowed agencies to agree to grant official time for employee union representatives up to 40 hours or up to one-half the time spent in negotiations during regular working hours. *Id.* at 1244-1245. In spite of this change with respect to official time, Exec. Order No. 11491 as amended still did not authorize agencies to pay travel expenses or per diem allowances for employees serving as union representatives. *Id.* at 1245; Pet. App. 42a n.6; Federal Labor Relations Council, Report and Rec-

ommendations on the Amendment of Executive Order 11491 (*Legis. Hist.* 1258, 1264).[4]

When Congress enacted Title VII of the Civil Service Reform Act of 1978, it changed certain of the prior executive order policies. In particular, Congress provided in 5 U.S.C. (Supp. V) 7131(a) for the grant of essentially unlimited amounts of official time for certain employee union representatives engaged in negotiation of a collective bargaining agreement. However, neither Title VII nor its legislative history contained any reference to travel payments or per diem allowances for these employee union bargaining agents.

3. In November 1978, petitioner, the Bureau of Alcohol, Tobacco and Firearms of the Department of the Treasury, notified the National Treasury Employees Union ("the Union") that it intended to move its Lodi, California, office to Sacramento, and to establish a reduced duty post at a new location in Lodi (Pet. App. 2a). The Union, which represented some of the Bureau's employees affected by the relocation, informed the Bureau that it wished to negotiate concerning the move and its impact on employees in the bargaining unit (*id.* at 22a). The Union designated as its bargaining agent for these negotiations Donald Pruett, a Bureau employee who lived in Madera, California, and was stationed in Fresno (*id.* at 2a). Pruett notified the Bureau that he wished to inspect the new facilities

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[4] The Federal Labor Relations Council report is reprinted in Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978* (Comm. Print 1979) ("*Legis. Hist.*").

(Keehan deposition of Mar. 7, 1980, at 11).[5] Bureau officials agreed to meet with Pruett at the proposed Sacramento office to examine the facilities there and in Lodi (Pet. App. 2a).

On the morning of February 23, 1979, several Bureau officials met Pruett in Sacramento and toured the offices. They inspected the physical facilities and the location of the desks, as well as the availability of restrooms, a cafeteria, and parking (Tr. 28-29, 54-56). Pruett "wandered around" by himself for a time, examining the building and offices (*id.* at 28-29). The parties then drove to Lodi and, after lunch, toured the new reduced office site, examining the proposed arrangement of desks, parking, and access to restaurants (*id.* at 57-66).

Pruett and the Bureau officials then went to the existing Lodi office where they discussed the impact of the planned move (Pet. App. 2a). Pruett pronounced the new facilities acceptable, except for parking availability in Sacramento (*id.* at 24a-25a). The parties discussed assignment of employees to the two new offices and the possibility of excusing employee tardiness for the first week in Sacramento (*id.* at 25a). On the day of negotiations, Pruett left his home in Madera around 6:15 a.m. and returned at approximately 5:45 p.m., traveling a total of some 300 miles in his own car (*ibid.*; Tr. 36, 37).

Pruett sought to have the February 23 session classified as a quarterly meeting for which official time was authorized in the collective bargaining agreement between the Union and the Bureau (Pet. App. 3a). The Bureau refused Pruett's request on the ground that the

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[5] The deposition of Mardell Keehan, a Bureau personnel specialist, is part of the record in this case (Tr. 8-11, 68-69). "Tr." refers to the transcript of the February 27, 1980, hearing before the FLRA Administrative Law Judge.

agreement did not authorize official time for mid-term negotiations, as opposed to the quarterly meetings (*id.* at 3a, 23a).[6] The Bureau informed Pruett that he could take either annual leave or leave without pay for the day he had been away from his post (*id.* at 3a).

4. In June 1979, several months after the Bureau's decision not to authorize official time for Pruett, the Union filed an unfair labor practice charge with the FLRA. The Authority's General Counsel issued a complaint charging that Pruett was entitled to official time for his day of touring and negotiating under 5 U.S.C. (Supp. V) 7131(a) (Pet. App. 27a). In the course of a hearing before an Administrative Law Judge, the complaint was amended to add a claim that, in addition to paying his salary, the Bureau should have paid Pruett's travel expenses and a per diem allowance (*id.* at 3a).

In December 1979, shortly before the General Counsel filed this complaint against the Bureau, the FLRA had issued an Interpretation and Guidance concerning official time and travel expenses and per diem (2 F.L.R.A. No. 31 (1979); Pet. App. 35a-47a).[7] In its Interpretation, the Authority first concluded that under 5 U.S.C. (Supp. V) 7131(a) federal agencies must grant official time to employee union representatives for all types of collective bargaining, including mid-term negotiations (Pet. App. 37a-41a). The Authority then found that, although Section 7131(a) and its legislative history

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[6] The agreement also made no reference to payment of a per diem allowance or travel expenses of employee union representatives engaged in collective bargaining (R. 136).

[7] Although the Authority provided a notice and comment period, the Interpretation apparently was issued not under the Authority's statutory power to promulgate regulations (5 U.S.C. (Supp. V) 7134), but rather under 5 U.S.C. (Supp. V) 7105(a)(1), which requires the Authority to provide leadership in establishing policies and guidance relating to federal labor-management relations (Pet. App. 4a).

nowhere mention travel expenses or per diem allowances, that section nonetheless requires federal agencies to pay such costs for all employee union representatives for whom official time is granted for collective bargaining activities (Pet. App. 41a-45a).

Following the hearing, the Administrative Law Judge found that negotiations had indeed taken place between Pruett and Bureau officials on February 23, 1979 (Pet. App. 30a-31a). The ALJ stated that he considered himself constrained to follow the Authority's recent Interpretation and Guidance (*id.* at 28a-29a). He accordingly recommended that the Bureau be ordered to grant Pruett official time for the day of negotiations and to pay his travel costs and per diem, and that it be required to post a notice stating that the Bureau would do the same for employee union representatives in future negotiations (*id.* at 32a-33a).

The Bureau timely filed exceptions to the ALJ's decision. In September 1980, the Authority affirmed and adopted the decision of the ALJ and ordered the recommended relief (Pet. App. 15a-19a). The Bureau then sought review in the court of appeals pursuant to 5 U.S.C. (Supp. V) 7123(a), and the Union intervened as a party in that appeal.

5. On appeal, the Bureau raised two issues: (1) whether 5 U.S.C. (Supp. V) 7131(a) requires agencies to grant official time to employee union representatives for mid-term negotiations; and (2) assuming that official time is required, whether Section 7131(a) also requires payment of travel expenses and per diem allowances of employee union representatives. The court of appeals enforced the Authority's order on both issues (Pet. App. 1a-11a).

The court first held that it must give deference to the Authority's Interpretation and Guidance if it was reasoned and supportable (Pet. App. 4a-5a). The court concluded that the Authority's decision regarding official

time for mid-term bargaining was reasonable, citing the language of the statute and its history (*id.* at 5a-9a).[8] The court gave relatively little attention to the issue of travel costs and per diem. It recognized, as did the Authority, that neither the statute nor its history refers to such payments (*id.* at 9a). The court reviewed the three reasons offered by the Authority in its Interpretation and Guidance as support for the view that the statute nonetheless requires payment of travel expenses and per diem[9] and concluded that the Authority's Interpretation appeared reasonable (*id.* at 9a-10a).

SUMMARY OF ARGUMENT

1. As the Federal Labor Relations Authority itself has conceded (Pet. App. 42a), neither Title VII nor its history "expressly adverts to the payment of travel expenses or per diem during participation in * * * negotiation activities" (footnote omitted). The provision the Authority cites as the basis for requiring a federal agency to pay travel expenses and per diem of em-

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[8] We have not sought review of this aspect of the court's decision.

[9] The court summarized (Pet. App. 9a-10a) the three reasons set out in the Authority's Interpretation and Guidance. The Authority had cited the fact that the language of Section 7131(a) is similar to that of 5 U.S.C. (Supp. V) 7131(c), which the Authority previously had interpreted as requiring payment of union travel expenses and per diem. (Section 7131(c) governs availability of official time for participation in proceedings before the Authority; like Section 7131(a), it does not mention travel expenses or per diem.) In addition, the Authority had concluded that employee union negotiators who were on official time while they were engaged in collective bargaining must be considered to be conducting "official business," so that they would be entitled to travel expenses and per diem under a separate statute, 5 U.S.C. (& Supp. V) 5702. Finally, the Authority had stated that payment of travel expenses and per diem would be consistent with a congressional intent in Title VII to equalize the positions of management and labor.

ployee union representatives—5 U.S.C. (Supp. V) 7131(a)—refers only to authorization of "official time" for such representatives. The consistent practice prior to the passage of Title VII was that federal agencies generally did not pay union travel expenses and per diem. This also is the rule in the private sector. The absence of any expression by Congress of an intent to change the prevailing practice indicates acceptance of that practice. Although Congress did change certain features of the federal labor-management relations program when it enacted Title VII, it set out those changes explicitly in both the statute and the legislative history, in contrast to its silence here.

Rather than supporting the Authority's Interpretation, the provisions of Title VII suggest that Congress did not intend that federal agencies defray travel expenses and per diem of employee union representatives. Under 5 U.S.C. (Supp. V) 7131(a), the provision the Authority cites, "official time" is authorized only for periods in which an employee "otherwise would be in a duty status." Since travel expenses and those expenses covered by a per diem allowance usually occur outside normal duty hours, it is unlikely that Congress would have used Section 7131(a) as a vehicle to require agency reimbursement of such expenses. Another section, 5 U.S.C. (Supp. V) 7101(b), states that the provisions of Title VII are to be interpreted in a manner consistent with "the requirement of an effective and efficient Government." The Authority's Interpretation, which places virtually the entire cost of negotiations on one party, applies unequal pressure on the parties, thereby undermining the effectiveness of collective bargaining. Finally, the Authority's Interpretation is likely to frustrate an important aim of Title VII—reducing labor-management friction in the federal sector. Monitoring of the reasonableness of union travel expenses would require agencies to intrude on internal union affairs and

would surely lead to disagreements about whether particular expenses are justified.

2. The conclusion of the court of appeals that the Authority's Interpretation is correct is inconsistent with well-established principles of statutory construction. This Court has emphasized that a statute should not be read in a manner that would impose significant monetary liability on the government unless Congress has indicated clearly that it intended such a result. See *United States* v. *Zazove*, 334 U.S. 602, 616-617 (1948). The Court also has made clear that waivers of sovereign immunity are to be strictly construed and must be unequivocally expressed. See, *e.g.*, *United States* v. *Testan*, 424 U.S. 392, 399 (1976). The Authority's Interpretation, however, imposes substantial monetary liability on federal agencies without any indication that Congress favored that result.

The principle on which the court of appeals did rely—deference to the statutory interpretation of an administrative agency—is one that is inappropriate in this case. The Authority's Interpretation is an interpretative rule and thus is entitled to less deference than a rule promulgated under its rulemaking authority. Moreover, the Authority relied in large part on its construction of 5 U.S.C. (& Supp. V) 5701-5709, a statute it does not administer. Finally, the Authority's Interpretation does not deserve deference because it involves a major policy decision—whether federal agencies should be required to expend substantial sums to fund employee union travel and per diem—that is properly made by Congress. See, *e.g.*, *NLRB* v. *Brown*, 380 U.S. 278, 291-292 (1965).

3. The reasoning offered in the Authority's Interpretation in support of the conclusion that 5 U.S.C. (Supp. V) 7131(a) requires federal agencies to pay travel expenses and per diem of employee union representatives cannot withstand scrutiny. The Authority cited the fact

that its interpretation of Section 7131(a) was consistent with its earlier construction of 5 U.S.C. (Supp. V) 7131(c), which addresses authorization of "official time" for participation in proceedings before the Authority. But no court has approved the Authority's construction of Section 7131(c), so that consistency does not suggest that either interpretation is correct.

The Authority also asserted that employee union representatives must be regarded as conducting "official business" of the government and therefore are entitled to receive travel expenses and per diem under 5 U.S.C. (& Supp. V) 5701-5709. However, Congress' conclusion that federal sector collective bargining is in the public interest does not suggest that employee union representatives are conducting "official business," since union representatives do not represent the interests of the agency, but rather those of the union and members of the bargaining unit. Indeed, the Comptroller General has recognized that employee union representatives who are on official time during negotiations are *not* conducting official business, despite the fact that collective bargaining may contribute to effective government. 44 Comp. Gen. 617, 618 (1965). Similarly, the Administrator of General Services, who is authorized to promulgate regulations for the administration of 5 U.S.C. (& Supp. V) 5701-5709, has never indicated that collective bargaining by employee union representatives constitutes "official business."

The Authority's final justification for its Interpretation was that agency payment of union travel expenses and per diem would help equalize the positions of union and agency negotiators. But while Congress itself took certain steps to alter the relative positions of federal

employee unions and agencies, there is no indication that it delegated broad authority to the FLRA to take additional steps that would alter the balance established by the express provisions of Title VII. Moreover, genuine equality would call for each party to bear its own costs, as is the norm in the private sector.

4. There is no question that Congress in enacting Title VII intended to encourage collective bargaining in the public sector, which it expressly found to be in the public interest. See 5 U.S.C. (Supp. V) 7101(a). But the Authority's Interpretation does not advance the interest in collective bargaining; rather, it impedes it. The collective bargaining process is best served when each party to negotiations uses its own resources to fund the out-of-pocket expenses of its negotiators, not when one of the parties is required to subsidize the entire process.

The court below is the only court of appeals that has accepted the Authority's Interpretation. Three other courts of appeals have rejected the view that Section 7131(a) requires federal agencies to pay travel expenses and per diem allowances of employee union representatives. See *Florida National Guard* v. *FLRA*, No. 81-5466 (11th Cir. Mar. 7, 1983); *Div. of Military & Naval Affairs* v. *FLRA*, 683 F.2d 45 (2d Cir. 1982), petition for cert. pending, No. 82-1021 (filed Dec. 16,1982); *United States Dep't of Agriculture* v. *FLRA*, 691 F.2d 1242 (8th Cir. 1982), petition for cert. pending, No. 82-979 (filed Dec. 13, 1982). Those courts correctly concluded that Congress did not intend to impose this unprecedented requirement on federal agencies and the federal fisc.

ARGUMENT

TITLE VII OF THE CIVIL SERVICE REFORM ACT OF 1978, 5 U.S.C. (SUPP. V) 7131(a), DOES NOT REQUIRE THAT A FEDERAL AGENCY PAY A PER DIEM ALLOWANCE AND TRAVEL EXPENSES TO EMPLOYEE UNION REPRESENTATIVES ENGAGED IN COLLECTIVE BARGAINING WITH THE AGENCY

A. Neither the Language of Title VII Nor Its History Indicates That a Federal Agency Must Pay a Per Diem Allowance and Travel Expenses to Employee Union Representatives Engaged in Collective Bargaining with the Agency

Nothing in the language or legislative history of Title VII suggests that Congress intended to require federal agencies to pay a per diem allowance and travel expenses to employee union representatives engaged in collective bargaining with the agency. The Federal Labor Relations Authority itself has conceded (Pet. App. 42a) that neither Title VII nor its history "expressly adverts to the payment of travel expenses or per diem during participation in * * * negotiation activities." The Authority nevertheless concluded that such payments are required by 5 U.S.C. (Supp. V) 7131(a), a section of Title VII. In fact, Section 7131(a) refers only to grants of "official time" to employee union representatives and nowhere mentions the wholly separate issue of travel expenses and per diem.[10] Nor is there any mention of travel expenses and per diem in any other section of Title VII or in the considerable legislative

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[10] 5 U.S.C. (Supp. V) 7131(a) provides:

> Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

history of the statute. Congress' total silence on the subject strongly indicates that it did not intend to impose an unprecedented requirement that federal agencies pay such expenses.

1. Several considerations make it quite unlikely that Congress would have imposed an obligation on agencies to pay travel expenses and per diem of employee union representatives without even mentioning that subject. As described at pages 5-7, *supra*, the consistent practice prior to the passage of Title VII was that agencies did not pay such costs; in fact, under the decisions of the Comptroller General, agencies were prohibited from doing so as a general rule. See 46 Comp. Gen. 21 (1966). The Federal Labor Relations Council, the Authority's predecessor, recognized this consistent practice in its 1971 report. See *Legis. Hist.* 1264. Thus, the normal pattern at the time Title VII was enacted was for each party to a negotiation to defray the expenses of its own representatives. See Pet. App. 42a n.6.

In view of this settled practice and the absence of any expressions of congressional intent to change it, Title VII should not be read to mandate a departure from the prior pattern. See *Finnegan* v. *Leu*, No. 80-2150 (May 17, 1982), slip op. 9 n.12 ("We think it virtually inconceivable that Congress would have prohibited [a] long-standing [union] practice * * * without any discussion in the legislative history of the Act"); *Florida National Guard* v. *FLRA*, No. 81-5466 (11th Cir. Mar. 7, 1983), slip op. 1884 (congressional silence concerning union travel expenses and per diem indicates acceptance of the pre-Title VII practice). It must be presumed that Congress was aware of the existing practice when it enacted Title VII. See *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). Congress' failure affirmatively to alter the settled practice indicates that it intended not to reverse the practice, but rather to codify it. See *Haig* v. *Agee*, 453 U.S. 280, 300 (1981); *Lorillard* v.

Pons, supra, 434 U.S. at 580; *Shapiro* v. *United States*, 335 U.S. 1, 16 (1948). See also *Burnet* v. *Harmel*, 287 U.S. 103, 108 (1932). Moreover, since a switch to a requirement that agencies pay per diem and travel expenses for employee union representatives would force agencies to make substantial expenditures from their limited funds, it is particularly unlikely that Congress would have made such a change sub silentio.[11] The legislative history does not indicate that Congress anticipated that passage of Title VII would result in increased travel expenditures for virtually all federal agencies, as the Authority's Interpretation would require. See H.R. Rep. No. 95-1403, 95th Cong., 2d Sess.

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[11] Union travel expenses and per diem can add up to a significant amount. Soon after the Authority issued its Interpretation and Guidance stating that Title VII requires federal agencies to pay such costs, an official of the Office of Personnel Management estimated that the new interpretation would cost 15 federal agencies over $2 million per year. See Gov't Empl. Rel. Rep. (BNA) No. 852, at 11 (Mar. 10, 1980). Payment of these expenses can impose a substantial burden on agencies. For example, in *EEOC* and *EEOC Council 216, AFGE*, 80 F.S.I.P. 38, at 5 n.6 (Dec. 4, 1980), a Factfinder's Report for the Federal Service Impasses Panel noted that, out of a total cost of $445,140 for negotiation of a basic collective bargaining agreement covering a single agency, travel expenses and per diem for employee union representatives amounted to $107,302. This amount was in addition to the $110,357 spent by the agency on salaries of the employee union representatives during the negotiations.

Within a year of the passage of Title VII, Congress indicated that its desire was to reduce agency travel expenditures, not to raise them. In September 1979, Congress enacted Section 501 of Pub. L. No. 96-74, 93 Stat. 572, the Treasury, Postal Service and general government appropriations bill, which restricted travel funds for the covered agencies to the amounts set forth in the agency budget estimates. A month later, Congress voted by joint resolution (Section 112 of Pub. L. No. 96-86, 93 Stat. 661) to reduce substantially the amounts spent on government travel in the following fiscal year.

89-98 (1978) (cost estimates for Civil Service Reform Act of 1978).

There is no question that Congress intended to make certain changes in the federal labor-management relations program when it enacted Title VII. However, it expressly articulated those changes in both the statute itself and the legislative history. For example, Section 20 of Exec. Order No. 11491, 3 C.F.R. 873 (1966-1970 Compilation) allowed agencies to agree to grants of official time to employee union negotiators up to 40 hours or up to one-half of the bargaining time during regular working hours (see page 6, *supra*). The Senate version of Title VII would have continued these limitations (see S. Rep. No. 95-969, 95th Cong., 2d Sess. 112 (1978); *Legis. Hist.* 772), while the House bill provided for unlimited official time for employee union negotiators during the hours they otherwise would be in a duty status (H.R. Rep. No. 95-1403, *supra*, 58; *Legis. Hist.* 704). During the debate on Title VII, there was specific discussion of a revision in the official time policy (see, *e.g.*, 124 Cong. Rec. 29188 (1978)), and Congress adopted the House approach, which was codified in 5 U.S.C. (Supp. V) 7131. This express change with respect to official time stands in sharp contrast to Congress' complete silence on the subject of travel expenses and per diem. That silence suggests an intent to retain the settled practice. See, *e.g.*, *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979); *Saxbe* v. *Bustos*, 419 U.S. 65, 74 (1974). This conclusion is reinforced by the statement of Representative Udall, the primary sponsor of Title VII: "What we really do is to codify the 1962 action of President Kennedy in setting up a basic framework of collective bargaining for Federal employees. * * * The Federal employee unions do not get much out of this amendment process that is not

already in the Executive order." 124 Cong. Rec. 29182 (1978); *Legis. Hist.* 923.[12]

Another indication that Congress did not intend any implicit change in the treatment of union travel expenses and per diem is that payment by the employer of such expenses is not the norm in the private sector. The National Labor Relations Board has compelled employers to pay union travel expenses only as an extraordinary remedy for an employer's failure to bargain in good faith. See *Div. of Military & Naval Affairs* v. *FLRA*, 683 F.2d 45, 48-49 (2d Cir. 1982), petition for cert. pending, No. 82-1021 (filed Dec. 16, 1982); *Marriott In-Flite Services*, 258 N.L.R.B. 755 n.1, 770 (1981); *J.P. Stevens & Co.*, 239 N.L.R.B. 738, 739, 773 (1978).[13] Cf. *Library of Congress* v. *FLRA*, No. 82-1240 (D.C. Cir. Feb. 25, 1983), slip op. 13 (reference to private sector precedent may be relevant to determination of public sector bargaining issues arising under Title VII). As the Second Circuit has observed,"[o]ne of the obvious and universal purposes of collecting union dues is to pay for the expenses of such important activities as collective bargaining with the employer." *Div. of Military & Naval Affairs* v. *FLRA*, *supra*, 683 F.2d at 49. Given the pre-Title VII practice with respect to union travel expenses and per diem in the federal sector and the prevailing practice in the private sector, Congress surely would have expressed affirmatively any in-

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[12] We do not suggest that the Authority is bound by rules set by its predecessor, the Federal Labor Relations Council. Rather, our argument is that the Authority is bound by congressional intent and that Congress did not intend to change the existing practice with respect to payment of travel expenses and per diem.

[13] The Eleventh Circuit has noted that if the Authority's position prevails, "the Federal Government would be the only federally regulated employer required to pay the travel and per diem expenses incurred by union negotiators." *Florida National Guard* v. *FLRA*, *supra*, slip op. 1885 n.11.

tent to impose a new and different rule. See *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 278-279, 285 n.13 (1974). There is no such expression here. Accordingly, it is most unlikely that Congress would have "meant the government to assume such an unusual burden, so different from any accepted practice in dealings between employers and employees, absent a clear and specific provision to that effect." *Div. of Military & Naval Affairs* v. *FLRA*, *supra*, 683 F.2d at 49.

2. If anything, the provisions of Title VII indicate that, contrary to the FLRA Interpretation and Guidance, Congress had no intention of requiring federal agencies to pay travel expenses and per diem of employee union negotiators. Section 7131(a) itself refers to official time for employees in terms of the period they "otherwise would be in a duty status." But per diem allowances are primarily designed to cover expenses usually incurred outside the time an employee normally would be in a duty status—breakfast, dinner, and overnight lodging. Travel expenses also frequently are incurred outside an employee's regular duty hours. Thus, the reference to duty status suggests that Congress did not view Section 7131(a) as a vehicle for requiring federal agencies to pay for union travel expenses and per diem.

In addition, the Authority's ruling on travel expenses and per diem cannot be squared with Congress' mandate that the provisions of Title VII are to be interpreted in a manner consistent with "the requirement of an effective and efficient Government." See 5 U.S.C. (Supp. V) 7101(b). A system under which one party bears virtually the entire costs of negotiation—including salaries, travel expenses and per diem allowances for both its own representatives and those of the other party to the negotiation—does not advance that goal. Such a system is bound to impose unequal pressure on the parties at the bargaining table, since only one

party, the agency, incurs the cost of prolonged negotiations. See *Florida National Guard* v. *FLRA*, *supra*, slip op. 1885 n.11 (characterizing Authority's position on travel expenses and per diem as "a windfall to unions, which would no longer bear the same economic incentive as the Government to negotiate quickly and effectively").[14] As a result, agencies may be forced to compromise at an early stage, particularly when agency budgets are tight. Bargaining under these circumstances cannot be regarded as either effective or efficient from the perspective of the government as a whole or of the public interest.

Finally, the Authority's interpretation frustrates one of the most important policies underlying the statute—reducing labor-management friction in the federal sector. See 5 U.S.C. (Supp. V) 7101(a)(1)(C) (finding that collective bargaining "facilitates and encourages the amicable settlement of disputes between employees and their employers involving conditions of employment"). A requirement that agencies pay union travel expenses and per diem tends to increase such friction rather than reduce it. An agency that pays for union travel presumably must monitor and control that travel on a regular basis to ensure that it is reasonable and necessary, as part of the agency's responsibility to account for expenditure of public funds.[15] Thus, the agency would be obliged to regulate what otherwise would be internal union matters, such as manner of travel for union representatives, locations from which they travel, and lengths of their stays. Such monitoring will lead

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[14] Even when a union fulfills its statutory duty to bargain in good faith (5 U.S.C. (Supp. V) 7114(b)), its willingness to compromise on difficult issues surely will be less if it has no obligation with respect to the cost of the negotiations.

[15] An agency may be required to monitor travel expenses in connection with investigations by the General Services Administration. See 5 U.S.C. 5707(b).

inevitably to disagreements between unions and agencies. Moreover, it forces agencies to take actions that encroach on the independence of unions in a manner that Congress could not have intended. See, *e.g.*, 5 U.S.C. (Supp. V) 7116(a)(3) (making it an unfair labor practice for an agency to sponsor, control, or otherwise assist any labor organization, except with respect to routine services and facilities).[16]

The tension between agencies and unions caused by the Authority's Interpretation is well illustrated by *Dep't of the Air Force, Air Force Logistics Command* and *AFGE, Council 214*, 10 F.L.R.A. No. 53 (Sept. 30, 1982). In that case the Air Force declined to pay travel expenses and per diem allowances for certain employee union negotiators whom the union wished to bring from a distant location, because the union failed to explain why employee union representatives stationed at the bargaining site, rather than those stationed at the dis-

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[16] The Authority's Interpretation is inconsistent with 5 U.S.C. (Supp. V) 7106(a) as well. In that section, Congress stated that nothing in Title VII is to affect the authority of an agency "to determine the mission, budget, organization, number of employees, and internal security practices of the agency * * *." 5 U.S.C. (Supp. V) 7106(a)(1). The Authority's creation of a requirement that agencies use appropriated funds for travel expenses and per diem of employee union representatives undermines an agency's control of its budget, since it forces the agency to make direct adjustments to a particular component of its budget. The result of the Authority's order is that agencies must reallocate existing funds and also increase their appropriations requests for travel in the future. Since agency travel funds are the subject of direct attention by Congress and are closely controlled by Congress and by agencies themselves (see page 18 note 11, *supra*), the Authority's ruling here is different from a situation in which the Authority orders an agency to take action that indirectly requires expenditure of funds or the payment of money to remedy an unfair labor practice. Thus, the Authority's ruling conflicts with Congress' intent to exclude unions from agency budget decisions.

tant location, could not be used for the negotiations. The union's refusal to justify its expenditures made it impossible for the Air Force to certify that the travel demanded by the union was essential, as required by departmental regulations. The union filed an unfair labor practice charge, and the Authority concluded that the Air Force's failure to pay for the travel demanded by the union constituted an unfair labor practice, despite the fact that payment in the absence of explanation would have violated governing regulations.

Similar disputes are certain to arise in other agencies and in other locations. Unless agencies surrender complete control over a certain percentage of funds set aside for travel, they will have to exercise some control over how unions spend travel funds. Dissension is especially likely toward the end of each fiscal year when agency funds may be scarce and many agencies must eliminate all but essential expenditures and travel. An agency's refusal to provide complete reimbursement for union travel because it has limited travel to those trips that are essential to the agency's mission will surely trigger more disagreements between agencies and unions, thus undermining the harmony Congress sought to foster.[17]

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[17] An agency can exercise some control over union travel costs because Section 7131(a) limits the number of employee union negotiators for whom official time is authorized to a level equal to the number of agency negotiators. But this proviso does not necessarily allow an agency to determine that particular union travel is reasonable or necessary. Furthermore, it would not be in the interest of effective labor relations for an agency to limit the size of its own representation solely for the purpose of keeping union travel costs low during a time of budgetary constraint.

The Authority has suggested in the courts of appeals that more recent rulings will reduce problems of union/agency friction caused by its Interpretation. Under these rulings, an employee union representative must be part of the relevant bar-

B. The Court of Appeals Failed to Apply, or Misapplied, Well-Established Principles of Statutory Construction in Affirming the Authority's Interpretation of 5 U.S.C. (Supp. V) 7131(a)

1. As the preceding section indicates, there is not a shred of evidence in Title VII or its history that Congress intended to require an agency to pay the travel expenses and per diem of employee union representatives engaged in collective bargaining with the agency. Given the absence of any indication of congressional intent to impose such a requirement, the court of appeals' affirmance of the Authority's Interpretation and Guidance is clearly contrary to well-established rules of statutory construction.

In *United States* v. *Zazove*, 334 U.S. 602 (1948), this Court declined to read the National Service Life Insurance Act of 1940 in a manner that would increase sub-

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gaining unit in order to be on official time, and official time need not be authorized for negotiation of a local supplement to a national master agreement. See *Air Force Logistics Command, Wright-Patterson AFB, Ohio* and *Wright-Patterson AFB Fire Fighters*, 7 F.L.R.A. No. 118 (Jan. 22, 1982); Interpretation and Guidance, 7 F.L.R.A. No. 105 (Jan. 15, 1982). These rulings may lessen the impact of the Authority's Interpretation in some cases, but there is no indication that they would apply to a case like this one or to the others that have been considered by the courts of appeals. Moreover, the Authority has held that, to the extent authorization of official time is not required by statute, an agency must bargain about granting official time, even to employees outside the bargaining unit. See *United States Naval Space Surveillance Systems*, and *Local 2096*, 9 F.L.R.A. No. 30 (June 23, 1982), motion for reconsideration granted (Mar. 17, 1983), petition for review pending, Nos. 82-1726, 82-1897 (4th Cir.). The Authority has further held that agencies must pay travel expenses and per diem even when official time is negotiated by the parties pursuant to 5 U.S.C. (Supp. V) 7131(d), rather than required under Section 7131(a). See *National Treasury Employees Union* and *Dep't of the Treasury, U.S. Customs Service*, 9 F.L.R.A. No. 70 (July 21, 1982), petition for review pending, No. 82-2116 (D.C. Cir.).

stantially the cost to the United States in the absence of an express statement that Congress intended such a result, despite the respondent's argument that such a reading would effectuate the beneficial purposes of the Act. The Court observed that "Congress nowhere specified that the United States would bear the huge cost of the enhanced liability" that would result from the interpretation urged by the respondent (*id.* at 616-617) and concluded that "that striking omission is persuasive, in the absence of cogent considerations to the contrary, that no generosity of this magnitude was contemplated" (*id.* at 617; footnote omitted). The Court cited (*id.* at 617 n.24) the statement of Mr. Justice Holmes, writing for the Court in *Pine Hill Coal Co.* v. *United States*, 259 U.S. 191, 196 (1922): "A liability in any case is not to be imposed upon a government without clear words * * * and where, as here, the liability would amount to great sums, only the plainest language could warrant a court in taking it to be imposed * * *." See also *United States* v. *MacCollom*, 426 U.S. 317, 321 (1976) (plurality opinion; citation omitted): "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress."

The principle articulated in *Zazove* counsels against interpreting 5 U.S.C. (Supp. V) 7131(a) in a manner that requires agencies to pay travel expenses and per diem for employee union representatives. The Eighth Circuit recognized that application of the principle leads to rejection of the Authority's Interpretation: "Because we are unwilling to impose additional financial liability on the Government without an affirmative directive from Congress, we prefer the interpretation that does not make the Government liable for [travel expenses and per diem of employee union representatives]." *United States Dep't of Agriculture* v. *FLRA*, 691 F.2d

1242, 1247 (1982), petition for cert. pending, No. 82-979 (filed Dec. 13, 1982). See also *Florida National Guard* v. *FLRA*, *supra*, slip op. 1885 (rejecting the view "that Congress, without the briefest of references to the matter, intended the Government to assume this potentially enormous financial liability").

Indeed, the court of appeals' ruling is contrary to the more general principle that waivers of sovereign immunity must be strictly construed. See *United States* v. *Kubrick*, 444 U.S. 111, 117-118 (1979); *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941). A waiver of sovereign immunity may not be implied, but must be unequivocally expressed. See, *e.g.*, *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *United States* v. *Testan*, 424 U.S. 392, 399 (1976). The Court's decision in *Testan* makes clear that these principles are fully applicable to a monetary claim by a federal worker arising out of an employment relationship.[18] See also *Army & Air Force Exchange Service* v. *Sheehan*, No. 80-1437 (June 1, 1982). Because Congress made no mention of agency payment of travel expenses and per diem of employee union representatives in either Title VII or its history, there is no unequivocally expressed waiver of sovereign immunity that would permit a court to enforce an order mandating such payments.[19]

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[18] In *Testan* two federal employees asserted claims for back pay, alleging that their positions should have been classified at a higher grade. The Court rejected the claims on the ground that the United States had not waived sovereign immunity with respect to money damages of the type sought by the employees. The Court indicated that even if the Civil Service Commission were to find that the employees' positions had been misclassified, and thus that they should have received higher salaries in the past, the employees could not obtain a monetary award against the federal government in the absence of a statute waiving sovereign immunity. 424 U.S. at 404-405.

[19] We do not contend that the Authority may not order appropriate monetary relief once it has found that an agency has

2. Instead of applying the relevant principles of statutory construction stated in *Zazove* and in the cases involving waivers of sovereign immunity, the court of appeals invoked the principle of deference to an agency's construction of a statute it administers. The court concluded that the Authority's Interpretation should be given deference if it is "reasoned and supportable" and if it is "reasonably defensible" (Pet. App. 5a). But such deference is inappropriate in this case. As the court of appeals recognized (*id.* at 4a), the Interpretation and Guidance is an interpretative rule and therefore is entitled to less weight than a rule issued pursuant to the FLRA's rulemaking authority. See *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141 (1976). See also *Florida National Guard* v. *FLRA*, *supra*, slip op. 1881. Moreover, courts are the final authorities on issues of statutory construction (see *SEC* v. *Sloan*, 436 U.S. 103, 118 (1978)), and they "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB* v. *Brown*, 380 U.S. 278, 291-292 (1965). Finally, "'[t]he deference owed to an expert tribunal cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.'" *Id.* at 292, quoting *American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965). Whether to require federal agencies to expend substantial sums to fund employee union travel and per diem is plainly a "major policy decision[ ] properly made by Congress."

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committed an unfair labor practice. See 5 U.S.C. (Supp. V) 5596(b). However, there must first be an unfair labor practice to be remedied. The Authority may not, as it has done here, identify an unfair labor practice by stretching the statute to find an implied duty to pay.

Deference to the Authority is particularly unwarranted in this case because its Interpretation is based largely on construction of a statute it does not administer. See *Florida National Guard* v. *FLRA*, *supra*, slip op. 1882; *United States Dep't of Agriculture* v. *FLRA*, *supra*, 691 F.2d at 1247; *Div. of Military & Naval Affairs* v. *FLRA*, *supra*, 683 F.2d at 48. The Authority reasoned (Pet. App. 43a) that employee union representatives who were authorized "official time" for collective bargaining activity pursuant to Section 7131(a) must be conducting the "official business" of the government within the meaning of 5 U.S.C. (& Supp. V) 5701-5709. Under 5 U.S.C. (& Supp. V) 5702 employees "traveling on official business" are entitled to receive a per diem allowance. But Section 5702 and other parts of 5 U.S.C. (& Supp. V) 5701-5709, are administered not by the Authority but by the General Services Administration. In 5 U.S.C. 5707(a), Congress has delegated to the Administrator of General Services the authority to prescribe regulations necessary for the administration of 5 U.S.C. (& Supp. V) 5701-5709. As we discuss below, GSA has never construed the term "official business," as used in 5 U.S.C. (& Supp. V) 5701-5709, in the manner adopted by the FLRA.

C. The Reasoning Offered by the Authority in Support of Its Interpretation of 5 U.S.C. (Supp. V) 7131(a) Cannot Withstand Scrutiny

The court of appeals deferred to the FLRA on the question of per diem allowances and travel expenses because it concluded that the Authority's Interpretation and Guidance was "reasoned and supportable" (Pet. App. 11a). But an examination of the Authority's reasoning shows that none of the three justifications offered by the Authority in support of its Interpretation can withstand scrutiny. Indeed, three other courts of appeals have found the Authority's reasoning to be unpersuasive. See *Florida National Guard* v. *FLRA*,

supra; United States Dep't of Agriculture v. *FLRA*, *supra; Div. of Military & Naval Affairs* v. *FLRA*, *supra*.

1. First, the court below found it significant (Pet. App. 9a) that the Authority had read Section 7131(a) consistently with its prior interpretation of 5 U.S.C. (Supp. V) 7131(c). Section 7131(c) states that the Authority may require authorization of official time for employees participating on behalf of their unions in proceedings before the Authority. Although Section 7131(c), like Section 7131(a), nowhere mentions travel expenses or per diem allowances, the Authority had concluded that Section 7131(c) allows it to require agencies to pay such costs for employees who participate on behalf of their unions in Authority proceedings. See 5 C.F.R. 2429.13. But the Authority did not offer any reasons for its interpretation of Section 7131(c) when it promulgated its interim regulations. See 44 Fed. Reg. 44740, 44771 (1979). Moreover, no court has yet determined whether the Authority's reading of Section 7131(c) is proper. Thus, it is as unsupported as the Authority's construction of Section 7131(a). The fact that the Authority has interpreted the two provisions consistently does not suggest that either interpretation is correct. See *United States Dep't of Agriculture* v. *FLRA*, *supra*, 691 F.2d at 1250 n.18.

2. Second, the court below accepted (Pet. App. 10a) the Authority's assertion that, because Congress declared collective bargaining in the federal sector to be in the public interest (see 5 U.S.C. (Supp. V) 7101(a)), employees serving as union bargaining agents must be conducting the "official business" of the government and therefore are entitled to receive travel expenses and per diem under 5 U.S.C. (& Supp. V) 5701-5709. The latter statute provides for payment of a per diem allowance for "an employee while traveling on official business away from his designated post of duty." 5

U.S.C. (& Supp. V) 5702. But nothing in 5 U.S.C. (& Supp. V) 5701-5709, itself or in regulations issued by the Administrator of General Services indicates that collective bargaining by employee union representatives qualifies as "official business" within the meaning of the statute.[20] The Administrator has concluded that each individual agency is in the best position to determine when its employees are engaged in "official business" within the meaning of 5 U.S.C. (& Supp. V) 5701-5709. See FPMR 101-7, GSA Bulletin FPMR A–40, Supp. 1, Ch. 101.4 (Sept. 28, 1981) (except as otherwise provided by law, official travel must be authorized by the head of the agency or by an official to whom such authority has been delegated). The Authority's attempt to override the determinations of individual agencies in the area of collective bargaining thus is inconsistent with the Administrator's decision concerning how the statute should be administered.

The term "official business" normally refers to work done on behalf of an agency pursuant to a directive from an agency supervisor. But an employee negotiating on behalf of his union obviously must be beyond the authority of the agency when he acts in that capacity.[21] Unlike an agency representative, a union representative does not act on behalf of the agency; instead, his goal is to gain benefits for the members of the bargaining unit (including himself) and for the union. The Authority's conclusion that employee union representatives are engaged in "official business" seems to assume that opposing parties in collective bargaining pursue

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[20] As noted above, under 5 U.S.C. 5707(a) the Administrator of General Services is authorized to make rules for the administration of 5 U.S.C. (& Supp. V) 5701-5709.

[21] It would be incongruous for an agency to evaluate an employee's performance as a negotiator in the same manner as it would evaluate his performance while he is conducting "official business" on behalf of the agency.

the same goals. However, as this Court recently observed: "The entire process of collective bargaining is structured and regulated on the assumption that '[t]he parties * * * still proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest.'" *General Building Contractors Ass'n, Inc.* v. *Pennsylvania*, No. 81-280 (June 29, 1982), slip op. 18, quoting *NLRB* v. *Insurance Agents*, 361 U.S. 477, 488 (1960).

The Comptroller General has recognized the important difference between employee union representatives who are on official time during negotiations with an agency and employees who are conducting official business on behalf of the agency. Under the system that existed prior to passage of Title VII, employee union negotiators could receive official time for collective bargaining activities on a limited basis. The Comptroller General ruled that even though union/agency negotiations could be conducted on official time and "may contribute to the effective conduct of public business," employee union representatives could *not* be considered as conducting the official business of the United States. 44 Comp. Gen. 617, 618 (1965). The Comptroller General concluded: "On the contrary it would seem that such negotiations by employee representatives are primarily in the interest of the employee organization" (*ibid.*).[22] Although the Comptroller General's decision was issued while the executive order program was in effect, the distinction he drew between "official time" and "official business" is relevant under Title VII as

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[22] The Comptroller General subsequently modified this ruling (see page 6, *supra*), but only for special circumstances in which the agency concluded that travel by employee union representatives was primarily in the interest of the United States (*e.g.*, when an employee union representative traveled to a particular meeting location so that several agency representatives would not have to travel).

well. See *United States Dep't of Agriculture* v. *FLRA*, *supra*, 691 F.2d at 1248 n.11.

The Authority's reliance on Congress' general policy statements that federal sector collective bargaining is "in the public interest" and "contributes to the effective conduct of public business * * *" (5 U.S.C. (Supp. V) 7101(a)(B)) is misplaced. The Authority's reasoning, as the Eighth Circuit pointed out in *United States Dep't of Agriculture* v. *FLRA*, *supra*, 691 F.2d at 1248 (footnote omitted), "ignores the difference between the interest of the public at large and the interest of the Government as employer. While collective bargaining is generally in the public interest, employees representing their unions in collective bargaining do not primarily advance the interest of the Government." See also *Div. of Military & Naval Affairs* v. *FLRA*, *supra*, 683 F.2d at 48 (Congress' "general declaration of policy is 'too thin a reed' to support a substantive ruling which would cost the federal government substantial sums of money in per diem and travel expenses"); *Florida National Guard* v. *FLRA*, *supra*, slip op. 1884 ("Congress' declaration that the statutory protection of collective bargaining is in the public interest does not imply an intent to underwrite the process entirely").[23]

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[23] There are other "public interest" activities for which federal employees may be excused from their regular duties and receive their salaries without being charged with annual leave, but for which they do not receive travel expenses and a per diem allowance. Such activities include voting, donating blood, and participating in certain military funerals. See Civil Service Comm'n, Federal Personnel Manual, FPM Supp. 990-2, bk. 630, subchap. S11 (May 23, 1968 rev'd July 1969). Thus, there is no inevitable link between paid time during absence from work in connection with public interest activities and reimbursement for travel expenses and per diem.

The FLRA's General Counsel apparently has concluded that a grant of official time does not lead automatically to payment of travel expenses and per diem. In *United States Consumer Product Safety Commission, New York*, Case No. 2-CA-612, an unfair labor practice charge filed with the Authority, six em-

If Congress had wished to provide that collective bargaining constitutes "official business" within the meaning of 5 U.S.C. (& Supp. V) 5701-5709, it could easily have so stated when it drafted Title VII. Its failure to do so suggests that it did not intend to equate the two types of activities. See *Florida National Guard* v. *FLRA*, *supra*, slip op. 1882 (characterizing as a "great leap of faith" the Authority's equation of negotiation on "official time" with being engaged on "official business for the Government").

3. Finally, the court below accepted (Pet. App. 10a) the Authority's reasoning that agency payment of union travel expenses and per diem would help equalize the positions of union representatives and management representatives. The Authority concluded that Congress had intended that union and agency representatives be accorded "similar prerogatives" (*id.* at 43a), citing only a statement by Representative Clay to the effect that labor organizations "should be allowed official time to carry out their statutory representational activities *just as* management uses official time to carry out its responsibilities" (Pet. App. 44a, quoting 124 Cong. Rec. 29188 (1978) (emphasis added)). However, Representative Clay's statement refers only to official time; he nowhere mentions either travel expenses and per diem or any general obligation of agencies to equalize bargaining positions or "prerogatives" of the par-

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ployees had been granted official time pursuant to a collective bargaining agreement in order to participate in an arbitration hearing. The agency refused the employees' request for reimbursement of travel expenses and per diem. The Authority's Office of General Counsel advised the regional office that the charge filed by the union based on the agency's refusal to reimburse should be dismissed. See Federal Labor Relations Authority, Report on Case Handling Developments of the Office of the General Counsel, Jan. 1, 1981, through Mar. 31, 1981, at 23-24.

ties.[24] See *Florida National Guard* v. *FLRA*, *supra*, slip op. 1883 n.9; *United States Dep't of Agriculture* v. *FLRA*, *supra*, 691 F.2d at 1249-1250. Thus, the statement cited does not support the broad conclusion reached by the Authority.

Title VII itself indicates that Congress did not intend to create absolute equality between unions and agencies. In Section 7131(a) Congress expressly limited official time for employee union representatives to periods in which the employees otherwise would be in a duty status. No such limitation was imposed with respect to agency representatives. In addition, a union must bear the full cost of attendance at negotiations by any nonemployee negotiators (*e.g.*, members of the union's national staff). Congress did not impose any requirement that unions be provided with various services or items, such as secretarial support, calculators or briefcases, that might be thought necessary to equalize the positions of the parties. Although Congress itself took certain limited steps to alter the relative positions of federal employee unions and agencies, such as the change in the official time policy, there is no evidence that it delegated broad authority to the FLRA to order any additional steps that would alter the balance established by the express provisions of Title VII.

Moreover, genuine equality of treatment would call for each party to bear its own out-of-pocket costs, as is the norm in the pri ate sector (see page 20, *supra*).

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[24] Statements by Representative Clay concerning the meaning of Title VII should be read with some caution. Representative Clay strongly supported a bill that was considerably more union-oriented than the legislation that eventually was enacted; he supported the final version of the legislation with reluctance. See, *e.g.*, 124 Cong. Rec. 29182 (1978) (statement of Rep. Udall); 124 Cong. Rec. 29186 (1978) (statement of Rep. Clay); *Legis. Hist.* 923, 930-931. This Court has declined to give weight to the views of those who sponsor legislation significantly different from that eventually enacted. See *Hardin* v. *Kentucky Utilities Co.*, 390 U.S. 1, 11 (1968).

Federal employee unions have financial resources that can be used for payment of members' travel expenses and per diem. See 5 U.S.C. (Supp. V) 7115 (providing for collection of union dues). See also *Florida National Guard* v. *FLRA*, *supra*, slip op. 1884 (union dues are collected for expenses such as travel and per diem). Thus, employee union representatives would not necessarily pay their own expenses; instead, they would be in a position similar to that of agency negotiators, whose expenses are paid by the agency they represent. Under the Authority's Interpretation, however, one party bears virtually the full cost of both parties to the negotiations—a result that is difficult to square with either the principle of equality or the goal of effective and efficient collective bargaining. See pages 21-22, *supra*. As the Eleventh Circuit has pointed out: "If the entire financial burden of the negotiating process were shouldered by the Government, inequality—not equality—of bargaining status would result." *Florida National Guard* v. *FLRA*, *supra*, slip op. 1884-1885.

In sum, neither the principle of equality nor the other justifications offered by the Authority can support its conclusion that Congress meant for the federal government, rather than the unions themselves, to underwrite the travel expenses and per diem of employee union representatives engaged in collective bargaining with federal agencies.[25]

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[25] The Authority also found support for its Interpretation in the fact that Congress rejected a Senate version of the federal labor relations legislation that would have carried forward the official time policies of Exec. Order No. 11491 (Pet. App. 42a n.6). But neither the House bill nor the Senate bill mentioned travel expenses or per diem; nor did the committee reports accompanying the bills refer to the subject. The conference report did not explain the substitution of the House version of the official time provision for the Senate version, nor did it mention travel expenses or per diem. See H.R. Rep. No. 95-1717, 95th Cong., 2d Sess. (1978). Thus, the rejection of the Senate version does not suggest any change in the existing policy with respect

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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to travel expenses and per diem. See *United States Dep't of Agriculture* v. *FLRA*, *supra*, 691 F.2d at 1248-1249.

The Authority further found it significant that Title VII expresses the purpose of encouraging collective bargaining, while Exec. Order No. 11491 on its face did not. But it is clear that encouragement of collective bargaining was an underlying purpose of the executive order program. See, *e.g.*, Section 11(a) of Exec. Order No. 11491, 3 C.F.R. 868 (1966-1970 Compilation) (*Legis. Hist.* 1250) (agencies and labor organizations "shall meet at reasonable times and confer in good faith with respect to personnel policies and practices and matters affecting working conditions"), as well as the preamble to that Executive Order, 3 C.F.R. 861 (1966-1970 Compilation) (*Legis. Hist.* 1244) (stating that efficient administration of the government is benefited by providing employees an opportunity to participate in formulation and implementation of personnel policies and practices and that such participation should be improved through the maintenance of constructive and cooperative relationships between labor organizations and management officials). The restatement of these principles in different language in Title VII does not suggest anything about whether the union or the federal government is to pay travel expenses and per diem incurred by employee union representatives.

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No. 82-799

In the Supreme Court of the United States

OCTOBER TERM, 1982

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY AND
NATIONAL TREASURY EMPLOYEES UNION

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

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QUESTION PRESENTED

Whether the Federal Labor Relations Authority reasonably determined that 5 U.S.C. (Supp. V) 7101 *et seq.*, which entitles a federal employee representing a union in collective bargaining with his employing agency to his usual pay from that agency, likewise entitles the employee to a per diem allowance and reimbursement from the agency for travel expenses incurred in connection with such bargaining.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-799

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY AND
NATIONAL TREASURY EMPLOYEES UNION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT FEDERAL LABOR RELATIONS AUTHORITY

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 672 F.2d 732. The decision and order of the Federal Labor Relations Authority (Pet. App. 15a-34a) is reported at 4 F.L.R.A. No. 40.

JURISDICTION

The judgment of the court of appeals was entered on March 22, 1982 (Pet. App. 12a-13a), and a timely petition for rehearing was denied on July 13, 1982 (Pet. App. 14a). On October 1, 1982, Justice Rehnquist extended the time in which to file a petition for a writ of certiorari to and including November 10, 1982. The petition was filed on that date and was granted on January 17, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The relevant provisions of Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. V) 7101 *et seq.*, and Chapter 57, subchapter I of Title 5 of the U.S. Code, are set forth as an addendum to this brief.

STATEMENT

A. Labor-Management Relations In The Federal Government, With Emphasis On Official Time And Payment Of Travel And Per Diem Expenses To Employee Union Negotiators For Collective Bargaining Negotiations

1. The Federal Labor Relations Authority ("the Authority" or "FLRA") was established effective January 1, 1979, as an independent agency in the executive branch of the federal government. Reorganization Plan No. 2 of 1978, 3 C.F.R. 323, 327-29 (1979), *reprinted in* 5 U.S.C. (Supp. V) app. at 428, 430-33. The Authority administers Title VII of the Civil Service Reform Act of 1978 (CSRA), Pub. L. No. 95-454, 92 Stat. 1191, 5 U.S.C. (Supp. V) 7101 *et seq.* ("the Labor Statute"), which became effective on January 11, 1979.

Before enactment of the Labor Statute, federal government labor-management relations were governed by Executive orders. Exec. order 10988 was the first effort to establish throughout the executive branch a legal framework for such labor relations.[1] The order permitted federal agencies to accord three levels of recognition to labor organizations, depending on the labor organization's level of support in the agency. Two of these levels—informal and formal recognition—authorized a labor organization respectively to meet with agency officials to "present . . .

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[1] Exec. order 10988, 3 C.F.R. 521 (1959-1963 Compilation), *reprinted in* Subcomm. on Postal Personnel and Modernization, of the Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 1211 (Comm. Print No. 96-7) ("Legis. Hist.").

its views on matters of concern" to its members, and to "consult" with agency management in the agency's establishment of working conditions. The third level, exclusive recognition, required an agency to, *inter alia*, negotiate a collective bargaining agreement with a labor organization. Exec. order 10988, sections 4-6, Legis. Hist. at 1212-14. The preamble to the Executive order recognized that employee participation in the establishment of working conditions "contributes to the effective conduct of public business," but did not endorse the collective bargaining process itself. No central authority was created to administer the order.

Section 9 of Exec. order 10988 provided that labor-management consultations and meetings "shall, whenever practicable, be conducted on official time. . . ."[2] However, under section 9, agencies could require collective bargaining negotiations with an exclusive representative to take place during the non-duty hours of the employees representing the union. Thus, official time was encouraged for meetings and consultations, but not for collective bargaining negotiations. This dichotomy was explained

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[2] The term "official time" is not defined in Exec. order 10988, subsequent Executive orders, or the Labor Statute itself. The phrase is also used in Title I of the Foreign Service Act of 1980, Pub. L. No. 96-465, Chap. 10, 94 Stat. 2128, 2142, 22 U.S.C. (Supp. V) 4118(d), in connection with collective bargaining negotiations conducted under that law. It is also referenced in regulations allowing a federal employee "official time" to take certain actions in connection with administrative proceedings. 29 C.F.R. (1982) 1613.214 (b) (an employee is allowed "a reasonable amount of official time to present [an equal employment opportunity] complaint if he is otherwise in an active duty status"); 5 C.F.R. (1983) 752.404(c) (an agency shall give an employee "a reasonable amount of official time" to prepare a response to a proposed adverse action by a federal agency). The term is not defined in any of these sources either. However, the Office of Personnel Management has defined "official time" in a Federal Personnel Manual letter as being "all time granted an employee by the agency to perform representational functions . . . when the employee would otherwise be in a duty status without charge to leave or loss of pay, and shall be considered hours of work." FPM Letter 711-161 (July 31, 1981).

on the basis that agency management could control the length of meetings and consultations, but not the length of bargaining sessions. Report of the President's Task Force on Employee-Management Relations in the Federal Service accompanying the issuance of Exec. order 10988 at 26 (November 30, 1961), Legis. Hist. at 1203.

In response to inquiries from agency officials, the Comptroller General of the United States ruled that, in the absence of legislation, employees representing labor organizations are not entitled to a per diem allowance and travel reimbursement from the agency for travel costs incurred in connection with collective bargaining under the order.[3] 45 Comp. Gen. 454 (1966); 44 Comp. Gen. 617 (1965). The Comptroller General viewed such employees to be acting primarily in the interest of the labor organization involved, not the federal government. 44 Comp. Gen. at 618. The Comptroller General's position was initially applied to meetings and consultations as well as to collective bargaining negotiations.

The Comptroller General subsequently modified these decisions. In 46 Comp. Gen. 21 (1966), the Comptroller General considered Civil Service Commission ("CSC") guidelines under which an agency could pay travel expenses of employee labor organization representatives attending employee-management meetings if the agency could certify that the meeting was "primarily in the interest of the Government" (*id.*). However, travel expenses to attend negotiation sessions were not, as a general rule, payable under the CSC guidelines (*id.*). The Comptroller General found that the guidelines established adequate standards to govern an agency's discretion in making travel payments. Accordingly, the Comptroller

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[3] Under 31 U.S.C.A. (West Supp. 1982) 3529, the Comptroller General is authorized to issue decisions on questions from agencies concerning payments to be made by the agency, or vouchers submitted to the agency for payment. This provision in its present form is essentially unchanged from what it was when the Comptroller General issued his decisions set forth herein. *See* 31 U.S.C. (1976) 74, 82d.

General ruled that agencies could make such payments consistent with the CSC guidelines (*id.* at 22).

2. Exec. order 10988 was superseded in January 1970 by Exec. order 11491. 3 C.F.R. 861 (1966-1970 Compilation), Legis. Hist. at 1244. The new order created the Federal Labor Relations Council ("FLRC" or "Council") as the central authority to administer the program. *Id.* at 864, Legis. Hist. at 1246. The FLRC was composed of three incumbent management officials (the Chairman of the Civil Service Commission, the Secretary of Labor, and the Director of the Office of Management and Budget), who served in an *ex officio*, part-time capacity. *Id.* The order empowered the Council to, *inter alia*, decide major policy issues arising under the order and adjudicate cases involving unfair labor practices, negotiability issues, and exceptions to arbitration awards.[4]

The preamble of Exec. order 11491 carried over its predecessor's general endorsement of employee participation in the establishment of working conditions, recognizing that the "efficient administration of Government" benefits therefrom. But the order again stopped short of endorsing the collective bargaining process itself as the specific means for achieving this benefit.[5]

Section 20 of Exec. order 11491 initially prohibited employees representing labor organizations from being on official time when negotiating a collective bargaining agreement with an agency. The prohibition was based on the view that an employee negotiating such an agreement is working on behalf of the labor organization, and "should not be in a duty status when so engaged." Study

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[4] This Court discussed the labor relations scheme established under Exec. order 11491, as amended, in *National Ass'n of Letter Carriers* v. *Austin*, 418 U.S. 264, 273-75 (1974).

[5] Only the "exclusive" form of labor organization recognition was retained from the old order, although "national consultation rights" for a labor organization, analogous to formal recognition under Exec. order 10988, were created (*id.* at secs. 9 and 10, Legis. Hist. at 1249-50).

Committee Report and Recommendations, August 1969, Which Led To Issuance Of Executive Order 11491 at 9, Legis. Hist. at 1236.

Section 20 of Exec. order 11491 was amended approximately one year later to authorize limited amounts of official time for employee union representatives in collective bargaining agreement negotiations. Exec. order 11616, 3 C.F.R. 605, 608 (1971-1975 Compilation), Legis. Hist. at 1268, 1270. Specifically, unions and agencies could negotiate official time allotments for employees representing unions, up to a maximum of either forty hours, or fifty percent of the time spent in negotiations (*id.*). The authorization of limited amounts of official time for bargaining was not to be construed as an authorization for "overtime, premium pay, or travel expenditures."[6] FLRC, Report and Recommendations on the Amendment of Executive Order 11491 (1975), Legis. Hist. at 1258, 1264.

3. Criticism of the exclusively management composition of the FLRC led to repeated recommendations for change.[7] These recommendations came to fruition with establishment of the Authority under Reorganization Plan No. 2 of 1978 and the Labor Statute. During legislative consideration of the Labor Statute dissatisfaction

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[6] However, the FLRC did hold that agency payment of travel expenses of employees representing unions at grievance and arbitration hearings could be negotiated. *National Treasury Employees Union and Dept. of the Treasury, U.S. Customs Service, Region VII*, 5 F.L.R.C. 250 (1977). The FLRC was never presented with the issue whether parties could negotiate over bargaining proposals that agencies pay travel and per diem costs of employee union representatives at collective bargaining negotiations.

[7] *See, e.g.*, Report of the Committee on the Law of Federal Government Employee Relations, *reprinted in* ABA Labor Relations § 188 (1977); H.R. 13, 95th Cong., 1st Sess. (1977), Legis. Hist. at 121, 131; H.R. 1589, 95th Cong., 1st Sess. (1977), Legis. Hist. at 183, 191-92; and Report of the Comptroller General on H.R. 11280, *reprinted in* H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 104, 106 (1978), Legis. Hist. at 711, 713.

was expressed with the labor relations situation in the federal government under Exec. order 11491, as amended. Congressman Clay stated: "Title VII [i.e., the Labor Statute] obviously represents congressional dissatisfaction with the state of labor-management relations in the Federal Service." The Congressman pointed to "the provisions of the [Executive] order and, especially, the straightjacket interpretation of them by the Federal Labor Relations Council" as the cause of the unsatisfactory Executive order program. 124 Cong. Rec. 29,187 (1978), Legis. Hist. at 931. *See also* 124 Cong. Rec. 29,200 (1978) (remarks of Congressman Ford), Legis. Hist. at 958; *Department of Defense* v. *FLRA*, 659 F.2d 1140, 1145 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982).

The Authority was created as an independent and neutral agency in the executive branch, for the purpose of interpreting and administering the Labor Statute. The Authority is composed of three full-time members appointed by the President with the advice and consent of the Senate. 5 U.S.C. (Supp. V) 7104(a), (b). Its role and functions under the Labor Statute are analogous in many respects to those of the National Labor Relations Board ("Board" or "NLRB") in the private sector under the National Labor Relations Act ("NLRA"), 29 U.S.C. 151 *et seq.* Thus, the Authority is empowered to, *inter alia*, determine appropriate units for labor organization representation, conduct representation elections, resolve unfair labor practice complaints, rule on exceptions to arbitrators' awards, and decide issues relating to the statutory duty to bargain in good faith. 5 U.S.C. (Supp. V) 7105(a)(2)(A), (B), (E), (G), and (H), respectively.

Under the Labor Statute unions and federal agencies negotiate on conditions of employment, as defined in 5 U.S.C. (Supp. V) 7103(a)(14), unless a bargaining proposal is inconsistent with law, rule or regulation. 5 U.S.C. (Supp. V) 7103(a)(12), 7114, 7116(a)(5), (b)(5), and 7117(a). Strikes and certain other forms of

concerted activities by federal employees are illegal (5 U.S.C. 7311(3), 18 U.S.C. 1918(3)) and constitute an unfair labor practice under the Labor Statute (5 U.S.C. (Supp. V) 7116(b)(7)(A)). Bargaining impasses are resolved by the Federal Service Impasses Panel, an entity within the Authority. 5 U.S.C. (Supp. V) 7119.

Congress vested considerable discretion in the Authority to administer the Labor Statute. For example, Congress directed the Authority to "provide leadership in establishing policies and guidance" in matters arising under the Labor Statute, and to "take such . . . actions as are necessary and appropriate to effectively administer the provisions of the [Labor Statute]." 5 U.S.C. (Supp. V) 7105(a)(1) and (a)(2)(I), respectively. Furthermore, Congress granted the Authority broad powers to promulgate regulations to carry out the provisions of the Labor Statute. 5 U.S.C. (Supp. V) 7134.

As to the policy toward the collective bargaining process in the federal government, Congress found that the process itself safeguards the public interest and contributes to the effective conduct of public business. 5 U.S.C. (Supp. V) 7101(a). Congress therefore concluded that "labor organizations and collective bargaining in the civil service are in the public interest." *Id.* As indicated at 3 and 5, *supra*, the Executive orders preceding the Labor Statute stopped short of such an endorsement. Also, in enacting 5 U.S.C. (Supp. V) 7131(a), Congress abolished restrictions on the amount of official time available for employee union negotiators that had previously been imposed under section 20 of Exec. order 11491, as amended. Under section 7131(a) of the Labor Statute, an employee union negotiator is authorized official time without limit to negotiate a collective bargaining agreement with an employing agency.[8] Congress made no ex-

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[8] The number of employee union representatives authorized official time under sec. 7131(a) is limited to the number of repre-

press reference, either in the language of the Labor Statute itself or its legislative history, to the availability or unavailability of travel expenses and per diem allowances to employee union negotiators.

B. Facts And Proceedings Below

1. In November 1978, officials of petitioner Bureau of Alcohol, Tobacco and Firearms ("BATF") notified the president of the National Treasury Employees Union, Chapter 81 ("union"), that it intended to relocate BATF's Lodi, California, area office to Sacramento and retain a reduced post of duty at a different location in Lodi (Pet. App. 2a). The union is the exclusive representative of all bargaining unit employees affected by the relocation. In December 1978, the union chapter president advised BATF that the union wished to negotiate the decision to move the office, or alternatively the impact the move would have on bargaining unit employees (Pet. App. 22a). The union named Donald Pruett, a union steward in BATF's Fresno area office who lived in Madera, California, to represent it in the matter (*id.*).

Pruett informed BATF by letter that he wished to begin negotiations, and arrangements were made by BATF officials and Pruett to meet in Sacramento and view the facilities (Ct. App. 147).[9] It was agreed that various BATF management officials would meet with Pruett at 9:30 a.m. on February 23, 1979 (Ct. App. 147-149). Several days before the scheduled meeting, Pruett spoke with two BATF management officials who were to be in Sacramento. He asked the officials whether the

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sentatives designated by agency management for the negotiations. 5 U.S.C. (Supp. V) 7131(a); *National Fed'n. of Fed'l Employees* v. *FLRA*, 652 F.2d 191 (D.C. Cir. 1981).

[9] "Ct. App." refers to the pages of the administrative record before the Authority, submitted to the Ninth Circuit Court of Appeals in the form of three bound volumes. The appendix to BATF's Petition for Writ of Certiorari ("Pet. App.") is serving in lieu of a Joint Appendix.

meeting could be considered as part of a "quarterly" meeting under the parties' collective bargaining agreement, or whether he could take "bank time," which would have enabled him to remain in a work status during the day of the meeting (Pet. App. 23a). Pruett's request was denied, and he was advised by telephone before the meeting that he would have to take some form of personal leave to attend the meeting (*id.*). This denial was followed up by letters after the meeting, which stated that it was not BATF's policy to grant official time for mid-term negotiations like those here involved, nor was it agency policy to reimburse employees for any expenses incurred in connection with such negotiations (*id.*, fn. 5).

As scheduled, the BATF officials and Pruett, who had to take annual leave for the day, met in the morning on February 23 at the new Sacramento office (Pet. App. 23a-24a). Pruett and the management representatives examined the Sacramento office facilities for about an hour, after which they drove to Lodi, had lunch, and met at the new Lodi post of duty office. There they again examined the various office facilities, this time for about thirty to forty-five minutes (Pet. App. 24a-25a). The parties then went to the old Lodi area office, where they discussed the impact of the move on bargaining unit employees (Pet. App. 25a). The session at the old Lodi office lasted approximately an hour to an hour and a half (Ct. App. 76). A summary of the day's discussions was subsequently prepared by BATF in a memorandum to Pruett. Pruett, who had left his home in Madera at 6:00 or 6:15 a.m. that day, returned home about 5:45 p.m., having driven 303 miles in his own vehicle (Pet. App. 25a; Ct. App. 44-45).

2. In June 1979, the union filed an unfair labor practice charge, pursuant to 5 U.S.C. (Supp. V) 7118 and 5 C.F.R. (1980) Part 2423, asserting that BATF had improperly compelled Pruett to take annual leave for the February 23 negotiations (Ct. App. 91). Subsequently the General Counsel of the Authority issued a complaint and notice of hearing based on the charge, alleging that BATF

violated 5 U.S.C. (Supp. V) 7116(a)(1) and (8) (Pet. App. 21a).[10] The basis for the complaint was that BATF had failed and refused to comply with 5 U.S.C. (Supp. V) 7131 by denying Pruett official time in which to engage in negotiations on the impact and implementation of BATF's proposal to relocate its Lodi area office (*id.*). A hearing on the complaint was held before an Authority Administrative Law Judge ("A.L.J."), at which time the complaint was amended without objection to clarify that "official time," as referenced in the complaint, included the payment of travel and per diem expenses (*id.*, fn. 1).

Following the hearing and submission of briefs, the A.L.J. issued a recommended decision and order based on the Authority's *Interpretation and Guidance*, 2 F.L.R.A. 265 (1979), set forth at Pet. App. 35a-47a.[11] In its Interpretation and Guidance, issued shortly before the General Counsel issued his complaint in this case, the Authority prescribed the obligation under the Labor Statute of an agency to make travel and per diem payments to employee union representatives in connection with collective bargaining negotiations.[12]

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[10] These subsections provide in relevant part as follows:

§ 7116. Unfair labor practices

(a) For the purposes of this chapter, it shall be an unfair labor practice for an agency—

(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

. . . .

(8) to otherwise fail or refuse to comply with any provision of this chapter.

[11] The Authority's Interpretation and Guidance was issued pursuant to 5 U.S.C. (Supp. V) 7105 and 7135(b), and 5 C.F.R. (1978) 2410.3. 44 Fed. Reg. 42,778 (July 20, 1979). In response to the Authority's invitation in the Federal Register to interested persons to express their views, twenty-two federal agencies, 8 federal employee unions and 3 private groups or individuals submitted comments to the Authority.

[12] The Authority also stated in the Interpretation and Guidance that employee union representatives involved in mid-term bargain-

The Authority held first that the reference to "official time" in 5 U.S.C. (Supp. V) 7131(a) confers an entitlement on an employee union negotiator to those forms of compensation apart from salary, such as travel and per diem payments, to which the employee normally would be entitled if the employee were performing regularly assigned duties (Pet. App. 42a). The Authority next noted that, while neither the Labor Statute nor its history expressly references travel or per diem payments for employee union negotiators, Congress repeatedly rejected efforts to carry over to the Labor Statute the provisions of Exec. order 11491, as amended, which did not authorize such payments and severely limited the amount of official time that could be granted for negotiation activities (Pet. App. 42a, fn. 6). Also, the Authority observed that the encouragement of collective bargaining is a stated purpose of the Labor Statute, unlike the Executive order (Pet. App. 43a).

Further, the Authority concluded that because Congress in the Labor Statute found the collective bargaining process to be in the public interest, participation in negotiations constitutes "official business" of the federal government under 5 U.S.C. 5702(a), thus warranting payment of travel and per diem expenses under that section (*id.*). The Authority also relied on Congress' intent to more nearly equalize through the Labor Statute the capabilities of the union side of the bargaining table with those of management (whose negotiators are uniformly paid travel expenses and per diem), in order to make the collective bargaining process more effective (Pet. App. 43a-44a). Finally, the Authority noted its interpretation of 5 U.S.C. (Supp. V) 7131(c), which is identical to the pertinent language in section 7131(a), as entitling employees on official time in Authority proceedings to travel and per diem expenses. 5 C.F.R. (1981) 2429.13.

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ing (i.e., negotiations arising from circumstances occurring during the term of a basic agreement) are entitled to official time under sec. 7131(a).

Based on this interpretation, the A.L.J. concluded that BATF's refusal to pay travel and per diem expenses to Pruett, contrary to the requirement of section 7131 of the Labor Statute as interpreted by the Authority, constituted unfair labor practices in violation of section 7116(a)(1) and (8) of that statute (Pet. App. 32a).[13]

BATF filed exceptions to the A.L.J.'s recommended decision and order with the Authority. Thereafter, the Authority issued its decision and order affirming the A.L.J.'s rulings, and adopting his findings, conclusions, and recommendations. The Authority accordingly ordered BATF to grant Pruett official time for the negotiations conducted on February 23, and to pay his travel and per diem expenses for the day (Pet. App. 16a-17a).

3. On appeal, a panel of the Ninth Circuit unanimously rejected BATF's arguments as to the travel and per diem aspect of the Authority's decision and order, and enforced the Authority's order in full (Pet. 1a-11a).[14] Finding the Authority's ruling to be "reasoned and supportable," the court of appeals approved the Authority's conclusion that employees on official time are properly considered to be on "official business" of the government, and thus entitled to travel and per diem payments under 5 U.S.C. 5702(a). The court held that Congress' express endorsement of the collective bargain-

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[13] The A.L.J. also ruled that the February 23 discussions were in fact negotiations within the meaning of that term under sec. 7131(a) of the Labor Statute; that the operative events giving rise to the unfair labor practices occurred after the effective date of the Labor Statute; and that Pruett's failure to submit a travel voucher for his expenses was not a prerequisite for finding violations of the Labor Statute, due to the obvious futility of such an action in light of BATF's actions in the case (Pet. App. 29a-32a). These conclusions, affirmed by the Authority, are not at issue before the Court.

[14] The Ninth Circuit also unanimously enforced the portion of the Authority's decision and order which held that the mid-term negotiations here involved were covered under sec. 7131(a), as referenced at 11, fn. 12, *supra*. BATF does not challenge the Ninth Circuit's ruling before this Court.

ing process as in the public interest warranted deeming negotiations as official business of the government. Congress' policy of favoring the collective bargaining process in its entirety also justified the Authority's effort to equalize more nearly the positions of the parties at the bargaining table.

Further, the court found no merit to BATF's claim that the availability of travel and per diem payments would decrease a union's willingness to agree to proposals at the bargaining table. The court pointed out that a dilatory union could be charged with bad-faith bargaining under the Labor Statute, or the Federal Service Impasses Panel could be brought in to resolve a bargaining impasse under 5 U.S.C. (Supp. V) 7119. In any event, the court noted, travel and per diem payments would, if anything, serve to equalize the pressure to agree at the bargaining table because management negotiators have received such payments all along (Pet. App. 10a-11a). Finally, the court observed that the Authority was interpreting section 7131(a) in a manner fully consistent with the way it had interpreted the same relevant language in section 7131(c) of the Labor Statute (Pet. App. 9a). A petition for rehearing and suggestion for rehearing *en banc* by BATF was denied by the court, with no judge requesting a vote on the suggestion for rehearing *en banc* (Pet. App. 14a).

SUMMARY OF ARGUMENT

1. Congress expressly mandated in 5 U.S.C. (Supp. V) 7123(c) that the standard of judicial review of an Authority order is whether the order is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). This standard requires a reviewing court to accord an agency's interpretation of its organic statute more than the "mere deference or weight" applicable in the case of an agency interpretive rule. *Batterton* v. *Francis*, 432 U.S. 416, 426 (1977). The reasoning of the Authority's Interpre-

tation and Guidance was subjected to judicial review by BATF and other agencies only after the Authority considered and applied the reasoning in the specific adjudication here involved, which is reviewable in court exclusively under 5 U.S.C. (Supp. V) 7123. Thus, BATF must challenge, and this Court must review, the Authority's action in this case in accordance with the conditions established in 5 U.S.C. (Supp. V) 7123(c), including application of the "arbitrary and capricious" standard of review.

Application of this narrow review standard advances an important purpose of Congress in enacting the Labor Statute: the establishment of the FLRA as the independent agency possessing considerable latitude and discretion in applying the Labor Statute, so that there could be a fresh start in federal sector labor relations over the Executive order program rejected by Congress as unsatisfactory.

Assuming *arguendo* that the broader interpretive rule review standard applies, the Authority's construction of the Labor Statute as requiring travel and per diem payments to employee union negotiators is nonetheless entitled to considerable deference from the Court. The Authority's reasoning in reaching this conclusion evidences "thoroughness, validity, and consistency of an agency reasoning," and moreover, the Authority is "precisely the type of agency to which deference should presumptively be afforded," in that it has been authorized by Congress to formulate general policy in administering the Labor Statute. *Federal Election Commission* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981).

BATF's argument that the Authority is not entitled to deference because the Authority's decision is based largely on a law it does not administer is without merit. The Authority's conclusion that Congress viewed collective bargaining as "official business" of the federal government, thus warranting travel and per diem payments under 5 U.S.C. (& Supp. V) 5702, was but one of several bases

for the Authority's decision. As properly recognized by the court below, the Authority's decision was supported by the conclusion that travel and per diem payments to employee union negotiators are consistent with Congress' intent under the Labor Statute itself. In any event, to the extent that 5 U.S.C. (& Supp. V) 5702 was considered by the Authority, it was scarcely the focal point of the Authority's inquiry. That section merely establishes the general, undefined standard of "official business" as warranting travel and per diem payments. Whether the standard was met in this case was resolved by the Authority by considering the Labor Statute exclusively.

2. The Authority reasonably concluded that it is consistent with Congress' intent in the Labor Statute to require agencies to pay the travel and per diem costs of employee union negotiators. By mandating that an employee union negotiator engaged in bargaining be on "official time," or "paid time" as it was called in the Labor Statute's legislative history, Congress intended the employee to be "on the clock," as though the employee were performing regularly assigned duties during negotiations. Because official time spent on negotiations is to be considered as hours of work, it was reasonable for the Authority to conclude that Congress intended an employee union negotiator, who must receive a normal day's pay from his employing agency for negotiating, to also receive attendant reimbursements such as travel and per diem payments just as an employee performing regularly assigned duties would.

This conclusion is also supported by examining other provisions of the Labor Statute in conjunction with the official time provision, section 7131(a). Section 7101(a) of the Labor Statute, unlike the preceding Executive orders, expressly endorses labor organizations and the collective bargaining process itself as being in the public interest. More than simply endorsing collective bargaining and labor organizations, however, Congress also acted to assist the collective bargaining process by, *inter*

alia, compensating employee union negotiators while at the bargaining table, pursuant to section 7131(a) of the Labor Statute. Thus, the Labor Statute taken as a whole reflects Congress' view that it is the product of the differing perspectives of union and management, and not just management's side of the bargaining table, which makes for a more efficient government and is in the best interest of the government. Because management negotiators receive travel and per diem payments as well as their pay, it is consistent with Congress' intent for the Authority and the court below to conclude that employee union negotiators should receive the same treatment. Moreover, in view of the fact Congress clearly intended to compensate employee union negotiators for their services at the bargaining table, it is reasonable to infer an intent to facilitate their ability to reach the site where the services are to be performed.

The effort of BATF to apply a private sector analogy, under which each side pays its own way to the bargaining table, is inapposite because it ignores Congress' intent to apportion federal funds to both sides of a relationship that is beneficial in its entirety for government operations. Indeed, the inapplicability of a private sector analogy is no more evident than from an examination of section 7131(a) itself. There, Congress took the unprecedented step of statutorily mandating employer compensation (official time) of employee union negotiators, where no similar statute exists in the private sector. The approach of apportioning federal funds also serves to more nearly equalize pressures on both sides to agree at the bargaining table.

The history of this issue prior to the Labor Statute also supports the Authority's decision and its affirmance by the court below. The prohibition on travel and per diem payments under the Executive orders was predicated on the view that an employee negotiating on behalf of a union acted primarily in the interest of the union. Congress rejected this view of the collective bar-

gaining process when it recognized in the Labor Statute that both union and management negotiators, as participants in that process, act in the interest of a more efficient government. Because Congress eliminated the basis on which travel and per diem payments were denied under the Executive orders, it is consistent with Congress' intent for the Authority and the court below to hold that travel and per diem payments by agencies are required under the Labor Statute.

None of the general principles of statutory construction relied on by BATF, to the effect that Congress must have been aware of the Executive order practice and intended to ratify the practice by failing to expressly reject it, warrant a contrary result. These principles are not applicable to a situation like this, where Congress has acted for the first time in an area to repudiate prior executive branch policies. Similarly, the principle of construction established in *United States* v. *Zazove*, 334 U.S. 602, 616-17 (1948), that a liability is not to be imposed on the government except upon a clear statement of congressional intent, is inapposite. The principle has been applied only to a very restricted class of cases in which a statute dealing exclusively with financial matters is at issue. The Labor Statute is not such a law. In any event, the rule is not applicable if, as in this case, there are "cogent reasons" for not applying it.

3. Travel and per diem payments to employee union negotiators are called for under 5 U.S.C. (& Supp. V) 5702, as well as under the Labor Statute itself. The Comptroller General has adopted a flexible, pragmatic standard for determining what constitutes "official business" justifying travel and per diem payments under that section. If the purpose of the travel is "sufficiently in the interest of the United States," it constitutes "official business." 44 Comp. Gen. 188, 189 (1964). Thus, employee travel to a hearing on the employee's own performance appraisal appeal, and to conferences and conventions, has been construed as "official business" under that section.

The direct benefit to government operations resulting from collective bargaining is similar in nature and degree to the benefits derived from other activities held to constitute "official business." Collective bargaining mandated by statute should therefore be considered as "official business" (i.e., "sufficiently in the interest of the United States") under 5 U.S.C. (& Supp. V) 5702, as the Authority and the court below properly concluded.

ARGUMENT

I. An Order Of The Authority Must Be Affirmed By A Reviewing Court If Supported By A Rational Basis

A. *Congress, In Enacting The Labor Statute, Expressly Stated Its Intent That A Court's Review Of An Authority Order Be Restricted To Determining Whether The Order Is Supported By A Rational Basis*

1. It is well settled that the manner and extent of judicial review of agency action is delineated by the legislation providing for such review. *American Federation of Labor* v. *NLRB*, 308 U.S. 401, 404 (1940). The case here under review involves an Authority decision and order in an unfair labor practice proceeding under 5 U.S.C. (Supp. V) 7116, 7118. The nature and scope of judicial review of such a decision and order is accordingly established by 5 U.S.C. (Supp. V) 7123, the provision of the Labor Statute establishing appellate jurisdiction to review Authority orders. Section 7123(c) states in relevant part that "[r]eview [by a court] of the Authority's order shall be on the record in accordance with section 706 of [Title 5 of the United States Code]."

In turn, 5 U.S.C. 706 provides that a "reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency ac-

tion." However, a reviewing court is to set aside agency action, findings, and conclusions only if they are found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. . . ." 5 U.S.C. 706(2)(A). This standard of review has been held by the Court to require according more than "mere deference or weight" to an agency's interpretation of a statute it is responsible for administering. *Batterton* v. *Francis*, 432 U.S. 416, 426 (1977). Rather, the standard requires a reviewing court to affirm agency action if it is supported by a rational basis, regardless of whether the reviewing court would have interpreted the statute differently had it been presented with the matter *de novo*. *Citizens To Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 416 (1971). *See also, Department of Defense* v. *FLRA*, 659 F.2d 1140, 1162, n.121 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982); *Northwest Airlines, Inc.* v. *Goldschmidt*, 645 F.2d 1309, 1317 (8th Cir. 1981); *Ethyl Corp.* v. *Environmental Protection Agency*, 541 F.2d 1, 34 (D.C. Cir.) (*en banc*), *cert. denied*, 426 U.S. 941 (1976).

This standard, of course, is the very limited type of judicial review that is normally applied by a court in reviewing regulations issued by an agency pursuant to a delegation of legislative authority (i.e., legislative regulations). *Batterton* v. *Francis*, 432 U.S. at 426; *Board of Education of the City of New York* v. *Harris*, 622 F.2d 599, 613 (2d Cir. 1979), *cert. denied*, 449 U.S. 1124 (1981).[15] It stands in marked contrast to the broader

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[15] By specifying the applicability of 5 U.S.C. 706 to judicial review of Authority orders, Congress intended reviewing courts to adopt as limited a standard of review as this Court and others have applied in considering orders of the NLRB under 29 U.S.C. 160. *See, e.g., NLRB* v. *Int'l Assoc. of Bridge, Structural, and Ornamental Iron Workers, Local No. 103*, 434 U.S. 335, 350 (1978); *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 266-67 (1975) (if the Board's construction of the NLRA is defensible and permissible under the NLRA, it should be affirmed).

analysis that a reviewing court undertakes when considering an agency interpretive rule. In that instance, a court merely considers the agency's interpretation of a statute as "one input in the interpretational equation," which the court may either accept or reject, depending on how persuasive the agency's reasoning is. *Zuber* v. *Allen*, 396 U.S. 168, 192 (1969). *See also, Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944).

2. Based on the foregoing, BATF's claim at 28 of its brief ("Br."), that the Authority's decision and order is entitled to less deference because it is based on an interpretive rule, is clearly without merit. Assuming *arguendo* that the Interpretation and Guidance is an interpretive rule, as BATF claims, no federal agency, including BATF, challenged the regulation directly in an appropriate federal appeals court under section 7123 of the Labor Statute. *United States Department of Agriculture* v. *FLRA*, 691 F.2d 1242, 1250-51 (8th Cir. 1982) (Heaney, J., dissenting), *petit. for cert. filed sub nom. FLRA* v. *Department of Agriculture*, 51 U.S.L.W. 3625 (Dec. 13, 1982); *Pacific Gas and Electric Co.* v. *FPC*, 506 F.2d 33, 45 n.32 (D.C. Cir. 1974). Rather, BATF waited until the Authority considered and applied its Interpretation and Guidance in an unfair labor practice adjudication which could be judicially reviewed only under section 7123 of the Labor Statute. Accordingly, BATF must challenge, and this Court must review, the Authority's rationale in accordance with the conditions set forth by Congress in section 7123 of the Labor Statute. That is, review in this case must be on the basis of whether the Authority's decision is arbitrary, capricious, an abuse of discretion, or otherwise inconsistent with law pursuant to 5 U.S.C. 706(2)(A).[16]

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[16] In discussing the appropriate standard of review, the court below referred to the interpretive rule test of *Skidmore* v. *Swift &*

Application of the narrow "arbitrary and capricious" standard of review to an Authority order based on the reasoning of an interpretive rule fulfills an important purpose of Congress in enacting the Labor Statute. In section 7123(c), Congress conferred on the Authority a broad scope of discretion in interpreting and applying the Labor Statute to matters before it. A reviewing court is expressly directed thereunder to alter the Authority's exercise of discretion only in very limited circumstances. This specific congressional intent in the judicial review area is fully consistent with Congress' broader intent in the Labor Statute to create an independent and neutral agency that would initiate a fresh start in federal sector labor-management relations. Congress' intent in this regard is best effectuated by application of the narrow standard of review to Authority orders expressly called for in section 7123(c).[17]

Co., 323 U.S. at 140. It appears clear, however, from the court's holding at Pet. App. 4a, 5a (the Authority's ruling is "reasoned and supportable," and thus "not arbitrary and capricious"), that the court actually applied the narrower "arbitrary and capricious" standard.

[17] Even assuming *arguendo* that the broader review standard applicable to interpretive rules should be applied to the Interpretation and Guidance in this case, the Interpretation and Guidance evidences "thoroughness, validity, and consistency of agency reasoning," which warrants according it deference. *FEC* v. *Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 37 (1981). Further, the Authority, like the FEC in the case just cited, is "precisely the type of agency to which deference should presumptively be afforded." *Id.* That is, the Authority has been vested by Congress with "primary and substantial responsibility for administering and enforcing" the Labor Statute, and has been authorized to "formulate general policy with respect to the administration" of that law. *Id., quoting Buckley* v. *Valeo*, 424 U.S. 1, 109 (1976).

B. *The Fact That The Authority Considered A Statutory Provision Outside The Labor Statute Does Not Serve To Broaden The Scope Of Review Of A Court*

BATF argues that deference to the Authority is unwarranted because its decision is "based largely on construction of a statute it does not administer" (Br. 29). Specifically, BATF asserts that the Authority interpreted 5 U.S.C. (& Supp. V) 5702, providing that employees "traveling on official business" are entitled to a per diem allowance. Because the General Services Administration ("GSA"), not the Authority, is responsible for implementing 5 U.S.C. (& Supp. V) 5702, BATF contends that the Authority is not entitled to deference. This contention is without merit.

The notion that the Authority's decision was "based largely" on an interpretation of 5 U.S.C. (& Supp. V) 5702 is simply incorrect. *Division of Military and Naval Affairs, State of New York* v. *FLRA*, 683 F.2d 45, 49 (2d Cir. 1982) (Oakes, J., dissenting), *petit. for cert. filed sub nom. FLRA* v. *Division of Military and Naval Affairs, State of New York*, 51 U.S.L.W. 3596 (Dec. 16, 1982). The Authority's decision was based on several factors, chief among them the Authority's conclusion that the Labor Statute in and of itself warrants a holding that travel and per diem payments should be made to employee union negotiators. The separate conclusion, alluded to by BATF, that negotiation of a collective bargaining agreement under the Labor Statute falls within the meaning of "official business" under 5 U.S.C. (& Supp. V) 5702, was but one of these several factors.

Furthermore, to the extent that section 5702 was considered at all by the Authority, it was not the focal point of its inquiry. Rather, that section merely establishes the general and undefined standard to be met in making travel and per diem payments, i.e., "official business." To determine whether Congress intended collective bargaining negotiations to fall within the ambit of that

phrase, the Authority focused its attention exclusively on the Labor Statute. Accordingly, it cannot be said that the Authority relied to any sizeable degree on an interpretation of section 5702, such that the Authority should not be accorded the deference to which it is otherwise entitled.[18] Finally, the Authority, like the NLRB, must on occasion consider subject matters not directly within its primary area of expertise, in order to effectuate the policies established by Congress in labor legislation. This does not mean, however, that the Authority is entitled to any less deference when it construes the Labor Statute in light of other provisions in order to implement the Labor Statute's policies. *Cf. Beth Israel Hospital* v. *NLRB*, 437 U.S. 483, 500-01 (1978) (rejecting a hospital's claim that a Board decision, establishing areas where hospital employees may be solicited, is not entitled to deference because the Board is not expert in hospital administration; Congress intended the Board, not hospitals, to develop labor relations policy in the health-care industry); *American Federation of Government Employees, AFL-CIO, Local 1968* v. *FLRA*, 691 F.2d 565 (D.C. Cir. 1982), *cert. denied*, 51 U.S.L.W. 3825 (May 17, 1983); *National Treasury Employees Union* v. *FLRA*, 691 F.2d 553 (D.C. Cir. 1982) (affirming the Authority's

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[18] To our knowledge, the General Services Administration (GSA) has never asserted that collective bargaining negotiations under the Statute are not "official business" under 5 U.S.C. (& Supp. V) 5702. In response to the Authority's invitation to interested persons to submit their views on the travel and per diem issue (44 Fed. Reg. 42,778 (July 20, 1979)), GSA did not argue such a position. Further, GSA has not sought to present such a view to the Authority as an *amicus curiae* in an Authority adjudicative proceeding under the Authority's rules, 5 C.F.R. (1983) 2429.9, or to amend its own regulations implementing sec. 5702, FPMR 101-7, GSA Bulletin FPMR A-40, Supp. 1 (Sept. 28, 1981), to reflect that collective bargaining negotiations are not in its view "official business." Thus, the Authority's assessment of how the Labor Statute and sec. 5702 interrelate is not at odds with that of GSA, because GSA has never expressed a contrary view despite ample opportunity to do so.

decisions on the negotiability of promulgation of employee performance standards and identification of critical job elements, in which decisions the Authority considered statutory provisions outside the Labor Statute and regulations issued by the Office of Personnel Management).

II. The Authority Reasonably Determined That Payment Of Travel And Per Diem Expenses Under The Labor Statute Is Consistent With The Intent Of Congress In Enacting That Statute

A. *The Language Of The Labor Statute Supports The Authority's Determination*

1. The language of 5 U.S.C. (Supp. V) 7131(a), in itself, supports the Authority's holding in this case and its affirmance by the court below. Congress intended the term "official time" in section 7131(a) to mean "paid time." H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 58 (1978), Legis. Hist. at 704; *National Federation of Federal Employees* v. *FLRA*, 652 F.2d 191, 194 (D.C. Cir. 1981). Therefore, employee union negotiators are viewed as "on the clock" when participating in collective bargaining negotiations, as if they were performing their regularly assigned duties. Accordingly, it was reasonable for the Authority to conclude that an employee union negotiator is entitled to receive his usual pay and attendant reimbursements, such as travel costs and a per diem allowance, just as he would were he performing his regularly assigned duties.[19]

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[19] While § 7131(a) grants official time "during the time the employee would otherwise be in a duty status," a literal reading of this phrase would lead to absurd results and should therefore be rejected. *Commissioner of Internal Revenue* v. *Brown*, 380 U.S. 563, 571 (1965). For example, assume a situation where one employee union negotiator works in a federal facility in Los Angeles on a midnight to 8:00 a.m. shift and a second negotiator works at the same facility on the 8:00 a.m. to 4:00 p.m. shift. Both travel to San Francisco for contract negotiations held from 8:00 a.m. to 4:00 p.m. Under a strictly literal view of § 7131(a), the first negotiator would not receive official time because he would

The conclusion that time spent negotiating a collective bargaining agreement on "official time" is to be considered as hours worked is buttressed by other sources as well. First, as indicated at 3, fn. 2, *supra*, the Office of Personnel Management has defined "official time" under the Labor Statute to be "hours of work." Second, section 9 of Exec. order 10988 stated that meetings and consultations between union and management were to be "conducted on official time" whenever practicable. This use of the term shows that "official time" was viewed as synonymous with work time. Third, this is also the meaning accorded the term by case law dealing with the propriety of agency discipline of federal employees who fail to account properly for their assigned hours of work. *Jones* v. *Farm Credit Administration*, 702 F.2d 160, 161-62 (8th Cir. 1983); *Pascal* v. *United States*, 543 F.2d 1284, 1287-88 (Ct. Cl. 1976). Finally, the Office of Workers Compensation Programs (formerly the Bureau of Em-

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not have "otherwise [been] . . . in a duty status" during the hours of bargaining, but the second negotiator would receive official time. Creating such an arbitrary disparity could not have been Congress' intent. It is far more reasonable to read § 7131(a) as providing that an employee receive his normal day's pay for a day spent in negotiations, regardless of the degree of precise overlap of bargaining and normal work hours.

BATF's claim (Br. 21) that Congress intended to preclude payments for travel and per diem costs, which are normally incurred during nonwork time, because Congress focused only on "the time the employee otherwise would be in a duty status," is similarly based on an overly literal reading. As just indicated, Congress' thrust in the Labor Statute was to treat employee union representatives for compensation purposes as if they were performing their normally assigned duties when involved in contract negotiations. Therefore, the employee is to receive a normal day's pay for a day spent in negotiations. Having decided to pay an employee for service as a union negotiator, it is most logical to conclude that Congress intended to provide the employee with the means of reaching the site where the services are to be performed. In short, the employee's compensation on the one hand, and travel and per diem payments on the other, are closely intertwined, and not as easily separable as BATF claims.

ployees' Compensation) of the Department of Labor ruled that an employee union negotiator is considered to be "in the performance of duty for the purposes of the [Federal Employees' Compensation Act] while he travels to or from or while he attends a negotiating session" under Exec. order 10988.[20]

2. The reasonableness of the Authority's conclusion is supported by other provisions of the Labor Statute. Section 7101(a) of the Labor Statute sets forth Congress' finding that "labor organizations and collective bargaining in the civil service are in the public interest."[21] This section, together with section 7131(a), demonstrates that Congress viewed the fruits of the collective bargain-

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[20] Department of Labor, Bureau of Employees' Compensation *FECA Program Memorandum No. 39* (July 19, 1965). The Federal Employees' Compensation Act, 5 U.S.C. (& Supp. V) 8101 *et seq.*, provides compensation to a federal employee injured "while in the performance of his duty." 5 U.S.C. (& Supp. V) 8102(a).

[21] Section 7101(a) provides, in its entirety, as follows:

§ *7101. Findings and purpose*

(a) The Congress finds that—

(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

(A) safeguards the public interest,

(B) contributes to the effective conduct of public business, and

(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

ing process *as a whole* (i.e., bilaterally arrived-at terms and conditions of employment for employees), and not just the assertion of management's position at the bargaining table, as being salutary for the functioning of the federal government.[22]

However, Congress did more in the Labor Statute than simply endorse the collective bargaining process as beneficial to the functioning of the federal government. It also took certain specific, concrete steps to assist the union component of that process. For example, Congress ensured that employing agencies would deduct union dues from employees' paychecks and transfer them to the union at no cost. 5 U.S.C. (Supp. V) 7115(a). Under Exec. order 11491, as amended, such a service had to be negotiated by the union and usually involved a charge being exacted by the employing agency for the service. *Information Announcement*, 1 F.L.R.C. 676, 677 (1973). Also, Congress expressly provided in the Labor Statute that agencies must furnish unions with data necessary for collective bargaining. 5 U.S.C. (Supp. V) 7114(b)(4). The Authority has ruled that Congress intended such data to be provided without charge to the union. *Veterans Administration Regional Office, Denver, Colorado*, 10 F.L.R.A. No. 78 (November 16, 1982).[23]

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[22] It has long been recognized that the collective bargaining process helps to eliminate employee frustrations resulting from the unilateral imposition of working conditions by employers, and the ensuing antagonism and work disruptions which invariably result from such frustrations. *See, e.g., H.K. Porter Co.* v. *NLRB*, 397 U.S. 99, 103 (1970); *Fibreboard Paper Products Corp.* v. *NLRB*, 379 U.S. 203, 210-11 (1964); A. Cartter & F. Marshall, *Labor Economics* 365 (Rev. Ed. 1972) ("collective bargaining is preferable to . . . unilateral action by unions and employers"); D. Bok and J. Dunlop, *Labor and the American Community* 223 (1970) ("the sense of participation through bargaining serves to mitigate the fear of exploitation on the part of the workers").

[23] Congress also expanded somewhat the scope of bargaining under the Labor Statute over what it had been under Exec. order 11491, as amended. For example, certain prohibited subjects of bargaining under sec. 12(b)(5) of Exec. Order 11491, as amended,

Furthermore, in section 7131(a) of the Labor Statute, Congress expressly created the type of payment here involved—compensation payments to employees representing unions in the negotiation of a collective bargaining agreement. Congress thus intended to compensate employee union negotiators with public funds for the services they perform on the union side of the bargaining table. Congress effectively directed that the employee would be paid in the same manner as if the employee had performed his regularly assigned duties.

By undertaking these steps to assist the bargaining process as a whole, Congress rejected the view that public funding of only the management side of the bargaining table is in the public interest.[24] In this respect, it is un-

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were made permissively negotiable under sec. 7106(b)(1) of the Labor Statute, 5 U.S.C. (Supp. V) 7106(b)(1). Also, rights to negotiate on procedures and appropriate arrangements, not expressly referenced in the Executive order, were created in secs. 7106(b)(2), (3) of the Labor Statute, 5 U.S.C. (Supp. V) 7106(b)(2), (3).

[24] Both the Labor Statute itself and decisions of the Authority interpreting the language describe the limitations Congress intended to place on this assistance. For example, § 7131(a) of the Statute specifically limits the number of employee union representatives who can receive official time to the number of management representatives, a number designated by the agency. *National Fed'n of Fed'l Employees* v. *FLRA*, 652 F.2d at 194. That subsection also limits paid time to employees of a federal agency; thus, a negotiator on a union's own staff is not entitled under 7131(a) to be paid by a federal agency. Finally, by forbidding official time for internal union activities such as membership recruitment in § 7131(b) of the Labor Statute, Congress clearly drew the line between collective bargaining on the one hand, which does directly benefit government operation; and internal union matters, which Congress found do not.

Further, the Authority has held that to be eligible for official time under § 7131(a), an employee union representative must be a member of the bargaining unit involved in the negotiations. *Air Force Logistics Command, Wright-Patterson AFB, Ohio*, 7 F.L.R.A. No. 118 (Jan. 22, 1982). The Authority also has held that official time is not available under § 7131(a) to negotiate local agreements

disputed that all expenses of management negotiators, including their salaries and travel expenses, are paid for by public funds (Pet. App. 43a). Congress simply intended to more equally apportion between union and management the extent to which the public fisc supports federal sector collective bargaining.[25] The intent of Congress to achieve some kind of parity in public support of the bargaining process in the federal government is further evidenced by the remarks of Congressman Clay at 124 Cong. Rec. 29,188 (1978), Legis. Hist. at 934, wherein he stated that employee union representatives "should be allowed official time to carry out their statutory representational activities just as management uses official time to carry out its responsibilities." While no express reference was made to travel and per diem payments, the statement certainly supports the conclusion that both union and management negotiators are to be considered "on the clock," performing the government's work when negotiating an agree-

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supplementing a master agreement, since such local agreements are negotiated below the level of exclusive recognition. *Interpretation and Guidance*, 7 F.L.R.A. No. 105 (Jan. 15, 1982), *petit. for review filed sub nom. American Fed'n of Gov't Employees* v. *FLRA*, No. 82-1272 (D.C. Cir., petit. filed Mar. 15, 1982). Finally, the Authority has held that the use of official time by employee union negotiators to *prepare* for collective bargaining negotiations is a matter to be negotiated by the parties under § 7131(d) of the Labor Statute, as distinguished from the use of official time in the actual negotiation of a collective bargaining agreement which is expressly authorized by § 7131(a). *Headquarters, 323rd Flying Training Wing (ATC), Mather Air Force Base, California*, 3 F.L.R.A. 304 (1980).

[25] That the employer benefits as much from the collective bargaining process as does the union has been recognized by various state courts in the workmen's compensation area. Thus, employees injured while engaging in contract negotiations and grievance adjustment on behalf of a union have been held to act for the mutual benefit of employer and employees, and thus entitled to benefits. *Mikkelsen* v. *N.L. Industries*, 71 N.J. 209, 370 A.2d 5 (1977); *Herndon* v. *UAW Local No. 3*, 56 Mich. App. 435, 224 N.W.2d 334 (1974); *Kennedy* v. *Thompson Lumber Co.*, 223 Minn. 277, 26 N.W.2d 459 (1947).

ment, and therefore entitled to receive all compensation and reimbursements, consistent with that status.[26]

Given this clear effort by Congress to use federal funds to assist both the union and management components of the bargaining process, the Authority's determination concerning travel and per diem payments is consistent with Congress' intent in enacting the Labor Statute.[27] As indicated, Congress wanted an effective collective bargaining process in the federal government, and undertook certain steps to accomplish that goal. One step was to require as a matter of law that employee union negotiators be compensated by their employer while at the bargaining table.

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[26] Contrary to BATF's claim at Br. 35, fn. 24, Congressman Clay's remarks in this regard are entitled to consideration. The official time provision of § 7131(a) of the Labor Statute is identical to that contained in the House bill as reported out of committee. *See* p. 37, *infra*. The Congressman was a major proponent of that bill. 124 Cong. Rec. 25,600-601 (1978), Legis. Hist. at 842-43. Thus, while Congressman Clay may not have been in full accord with other aspects of the bill as enacted, such as the scope of bargaining eventually adopted, the section of the law now at issue is very much a direct product of his labors. Accordingly, his views are most relevant. *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 640 (1967).

[27] This Court has regularly reviewed decisions of the NLRB from the point of view of whether the Board's interpretation of the NLRA is "permissible," as opposed to "required," under that Act. *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 266-67 (1975). The Court's inquiry has often been whether the Board's decision has entered into an area that is barred under the NLRA, as opposed to mandated by that Act. *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 236 (1963). This emphasis on whether a Board decision is consistent with the Act, as opposed to expressly mandated by it, has been attributed to the Board's congressionally assigned role as the balancer of "conflicting legitimate interests" arising under the NLRA. *NLRB* v. *Int'l Bhd. of Teamsters*, 353 U.S. 87, 96 (1957); *Republic Aviation Corp.* v. *NLRB*, 324 U.S. 793, 798 (1945). We respectfully submit that the Authority's decision should be viewed in the same light, as Congress intended the same general role for the Authority in the federal sector as it did for the Board in the private sector.

With Congress having taken this unprecedented action, the Authority reasonably decided that it would be anomalous indeed if Congress did not likewise intend to require employer payment of travel expenses to employee union negotiators. Otherwise, it would be more difficult for employee negotiators to reach the bargaining table and perform the function for which Congress intended to pay them.[28]

Accordingly, it must be concluded that the Authority acted reasonably and well within the scope of its discretion, as the agency responsible for overseeing the collective bargaining process in the federal government, in deciding that requiring travel and per diem payments as a corollary to official time for employee union negotiators is consistent with Congress' intent. The reasonableness of this holding is further supported by the fact that BATF is unable to demonstrate that requiring such payments violates any provision of law.[29]

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[28] The Authority's decision does not conflict with the cost-saving measures enacted by Congress in the travel area, referenced by BATF at Br. 18, fn. 11. Donald Pruett, the union negotiator who is the subject of the Authority's order at issue, would appear to be entitled to approximately $80.00 in mileage and part-day per diem under applicable regulations. There is, of course, no claim by BATF that it is incapable of making this payment. As to whether an agency has devoted insufficient travel funds to contract negotiations, as opposed to mission-related travel, such allegations can be dealt with on a case-by-case basis under the statutory unfair labor practice provisions, 5 U.S.C. (Supp. V) 7116 and 7118. At no time has the Authority held that an agency must commit more money to employee travel than has been approved by Congress.

[29] Contrary to BATF's assertion at 23, fn. 16, the Authority's holding is not inconsistent with BATF's right to determine its budget under 5 U.S.C. (Supp. V) 7106(a)(1). The Authority analyzed this right in *Office of Personnel Management*, 6 F.L.R.A. No. 76 (Aug. 19, 1981), *enforced sub nom. Office of Personnel Management* v. *FLRA*, No. 81-2106 (D.C. Cir. April 6, 1983). In that case, the Authority held that an agency's budget right would bar negotiations on a bargaining proposal that sought to prescribe a particular program or an amount of funds to be included in the

3. BATF and two courts have adopted the mistaken premise that the private sector model for the economic structure of collective bargaining, wherein both union and management are completely self-supporting institutions that pay their own way at the bargaining table, is applicable to the federal sector. Br. 20; *Florida National Guard* v. *FLRA*, 699 F.2d 1082, 1087 n.11 (11th Cir. 1983), *petit. for cert. filed*, No. —— (S. Ct. June 3, 1983); *Division of Military and Naval Affairs, State of New York* v. *FLRA*, 683 F.2d 45, 48 (2d Cir. 1982), *petit. for cert. filed sub nom. FLRA* v. *Division of Military and Naval Affairs, State of New York*, 51 U.S.L.W. 3596 (Dec. 16, 1982). However, private sector analogies must be applied in the federal sector only after careful consideration of the distinctions between the two sectors. *Library of Congress* v. *FLRA*, 699 F.2d 1280, 1287 (D.C. Cir. 1983). The argument set forth at 27 to 32, *supra*, shows that private sector analogies are inapposite herein.

The monies to be paid to employee union negotiators are not those of the agency in any proprietary sense, as are the funds at the disposal of a private employer. Rather, the funds at a federal agency's command originate from the public treasury as a result primarily of the sovereign's revenue-raising power. A federal agency expends these public funds in the manner directed by Congress. United States Constitution, art. I, sec. 9, cl. 7; *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321 (1937).[30] As set forth at 27 to 32, *supra*, however, Con-

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agency's budget, or had the effect of causing a "significant and unavoidable increase in costs which would not be offset by compensating benefits." *Office of Personnel Management*, 6 F.L.R.A. No. 76, slip op. at 3-4. Obviously, the Authority's decision herein does not require BATF to establish a new program or request a specific amount of funds from Congress for travel, nor has there been a showing that BATF must significantly increase its net costs of operation as a result of the decision.

[30] In this regard, Congress routinely appropriates funds to federal agencies for the purpose of paying employees' travel and per diem expenses. For example, Congress appropriated approximately

gress in the Labor Statute intended to assist the union component of the bargaining process by means of public funds.[31] As a result, it is a mistake to view the issue simply in private sector terms, as management paying a union's travel costs. Indeed, during House debates on the Labor Statute, several Congressmen commented on the distinctions between private and federal sector unions, due to the wholly different nature of the employers involved. *See, e.g.*, 124 Cong. Rec. 29,196 (1978), Legis. Hist. at 950 (remarks of Congressman Lott); 124 Cong. Rec. 29,200 (1978), Legis. Hist. at 959 (remarks of Congressman Rousselot). The issue must instead be viewed in terms

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$132 million for "salaries and expenses" for BATF in fiscal year 1979, the year in which Donald Pruett incurred the travel and per diem expenses here involved. Treasury, Postal Service, and General Government Appropriation Act of 1979, Pub. L. No. 95-429, 92 Stat. 1001, 1002. A line item for "travel and transportation of persons," in the sum of approximately $6 million, was included in BATF's congressionally approved budget estimate for that year. *Budget of the United States Government, Fiscal Year 1979, Appendix*, at p. 732. It is presumably this source which supports BATF's disbursement of travel funds to its management representatives at the bargaining table, and also would support such payments to employee union representatives. For this reason the present case is readily distinguishable from *United States* v. *MacCollom*, 426 U.S. 317 (1976), cited at Br. 26, wherein an expenditure was to be made without any supporting appropriation.

[31] The limitations placed on this assistance have already been discussed at 29, fn. 24, *supra*. It only need be said further that BATF's observation at Br. 35, that the Authority's decision would support a conclusion that secretarial services, equipment, and the like must also be provided by agencies to unions, is without merit. The Authority's decision, in its simplest terms, was that payment of travel and per diem expenses is a proper corollary to paying a salary to employee union negotiators. In other words, once Congress decided to pay employees to perform a service, it was reasonable for the Authority to conclude that Congress likewise intended to pay their way to the place where the service is to be performed. The Authority has never indicated that it views such wholly different forms of support as suggested by BATF as within the purview of Congress' intent.

of the use of public funds to support the bargaining process at a whole.[32]

4. BATF's claim at Br. 21, that the Authority's decision serves to place "unequal pressure" on the parties to agree is without basis. In fact, just the reverse is true. As the Ninth Circuit recognized (Pet. App. 10a), by allowing employee union negotiators access to the same federal funds to which management negotiators have access, the pressures on the parties are more nearly equalized. In this regard, federal employee unions must finance their negotiating efforts from whatever dues monies they can collect.[33] Management negotiators, on the other hand, have access to considerably larger amounts of federal funds to support their bargaining efforts. If anything, the Authority's decision serves to reduce this inequality. The need of union representatives to produce an acceptable agreement for their constituency, as well as the statu-

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[32] Unlike the NLRA, the Labor Statute expressly provides for numerous substantive terms and conditions of employment that in the private sector would be subject to bargaining between the parties. *See, e.g.*, 5 U.S.C. (Supp. V) 7106 (statutory management rights provision); 7121 (compulsory binding grievance arbitration); 7131 (the official time provision here at issue). Even in the private sector, where employer payment of employee union negotiators' travel and per diem expenses is a mandatory subject of bargaining, it is recognized that such payments contribute to more effective collective bargaining representation. *Midstate Telephone Corp.* v. *NLRB*, 113 L.R.R.M. 2213, 2217 (2d Cir. 1983). Under the Labor Statute, such improved representation implements Congress' intent, as described earlier, to institute an effective collective bargaining process in the federal government.

[33] An agency or union shop is prohibited under the Labor Statute. *Department of the Army, U.S. Army Support Command*, 1 F.L.R.A. 562 (1979). As stated by one commentator regarding the Authority's Interpretation and Guidance:

> In the private sector where the agency or union shop is legal, the practice calls frequently for unions to reimburse its negotiators for lost pay. But the same practice cannot reasonably be expected to prevail on the same scale in a sector in which unions have less money because of voluntary unionism.

H. Robinson, *Negotiability In The Federal Sector* 173 (1981).

tory unfair labor practice provisions requiring good faith bargaining and the availability of the Federal Service Impasses Panel to assist in impasse resolution pursuant to section 7119, will spur the union to conduct its side of negotiations expeditiously.[34]

B. *The History Of Official Time And Travel And Per Diem Authorizations For Collective Bargaining Negotiations In The Federal Sector Supports The Authority's Determination*

1. The contrast between the Labor Statute and the Executive orders preceding it, as they deal with official time and travel and per diem authorizations also supports the Authority's conclusion. (Pet. App. 42a, fn. 6).

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[34] The claim of BATF (Br. 22-23) that the Authority's ruling will result in friction between unions and management, because management will have to monitor the manner, length, and point of origin of travel, is unfounded. Under the Authority's ruling, the Federal Travel Regulations, which deal exhaustively with the subject, would determine the manner of travel. As to the length of travel, the Authority has ruled that official time and travel and per diem are available under sec. 7131(a) only for the duration of the bargaining sessions themselves. *Headquarters, 323rd Flying Training Wing (ATC), Mather Air Force Base, California*, F.L.R.A. 304 (1980).

Finally, as to the location from which an employee union negotiator is drawn, it is within the discretion of both agencies and unions holding exclusive recognition to designate their respective representatives when fulfilling their statutory responsibilities. *U.S. Air Force, Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio.* 4 F.L.R.A. No. 39 (Sept. 26, 1980). As mentioned *supra* n.19, in order to receive official time under § 7131(a) and thus be entitled to payment of travel and per diem expenses, an employee union negotiator must be a member of the bargaining unit involved in the negotiations. While thus recognizing a union's right to select its own employee negotiators, the Authority has additionally stated that "[t]his is not to say management may not by appropriate actions attempt to control its expenses incurred in negotions as, for example, through the establishment of mutually agreeable negotiation procedures, or ground rules which could include provision for pre-meeting exchange of written position statements." *Department of Health and Human Services, Region IV, Atlanta, Georgia*, 9 F.L.R.A. No. 150 at n.2 (Aug. 20, 1982).

As set forth in more detail at 2 to 6, *supra*, Exec. order 10988 did not view collective bargaining negotiations as being sufficiently in the government's interest to warrant expenditure of federal funds to support them. Exec. order 11491 originally preserved this prohibition, although it was amended to allow for limited amounts of official time for employee union negotiators. Travel and per diem payments were unauthorized. Several unsuccessful efforts were made during congressional consideration of the Labor Statute to enact the official time provision of Exec. order 11491, as amended. The House bill, as referred to committee, was identical in all relevant respects to the present section 7131(a). H.R. 11280, 95th Cong., 2d Sess. sec. 701 (1978), Legis. Hist. at 361. An effort in committee to substitute the Carter Administration's bill, which sought to simply codify the Executive order provision on, *inter alia*, official time, was defeated. 124 Cong. Rec. 25,601 (1978), Legis. Hist. at 844. Next, the full House defeated a proposed amendment by Congressman Collins which again sought to place the provisions of the order concerning, *inter alia*, official time in the Labor Statute. 124 Cong. Rec. 29,167; 29,202 (1978), Legis. Hist. at 903, 962. Finally, the Conference Committee rejected the Senate bill, which also sought to continue the order's policies. H.R. Rep. No. 95-1717, 95th Cong., 2d Sess. at 111 (1978).

In addition to official time and travel and per diem, the Labor Statute also rejected the Executive order's view that collective bargaining was not in the government's interest. The benefits of the process for government operations were expressly recognized for the first time. Having recognized this change, in the context of Congress' dissatisfaction with the FLRC's stewardship of the Executive order, it was most reasonable for the Authority to conclude that travel and per diem payments are consistent with Congress' intent in enacting the Labor Statute. The refusal to make such payments under the Executive orders was always based on the premise that collective bargaining was primarily in the union's

interest. Once that premise was rejected by Congress, it was logical to infer that the prohibition against travel and per diem payments was discarded as well.

2. BATF claims (Br. 17-20) that Congress' presumed awareness of the Executive order prohibition on travel and per diem payments, coupled with its failure to expressly change the practice, reflects an intent to codify the prohibition. However, Congress' silence on this specific area can be read just as easily to support the Authority's determination as it can to prohibit such payments.

In September 1980, approximately one year after the Authority issued its Interpretation and Guidance, Congress amended 5 U.S.C. (& Supp. III) 5702 and 5704 to provide for increased maximum amounts payable for per diem, actual subsistence, and mileage expenses. Act of Sept. 10, 1980, Pub. L. No. 96-346, 94 Stat. 1148. The amendment also directed the Administrator of the General Services Administration to undertake various studies of travel in the federal government. However, at no point during its consideration of this legislation did Congress indicate disagreement with the Authority's view that employee union representative travel for negotiations constitutes "official business" under sec. 5702(a). This silence, which certainly is not dispositive of Congress' intent, can be viewed as congressional ratification of the Authority's holding as much as BATF would read Congress' earlier silence as support for the contrary conclusion.

Further, there are marked differences between the cases cited by BATF (Br. 17-20) and the present case. In the present case, Congress was legislating for the first time in an area previously governed exclusively by Executive action. Moreover, Congress found that executive action unsatisfactory. In addition, Congress in the Labor Statute completely reversed the policy of the Executive orders upon which the travel cost prohibition had always rested: namely, that collective bargaining is in the best interest of federal employee unions only, and not the gov-

ernment itself.[35] The General Accounting Office has also recognized that enactment of the Labor Statute effected substantial changes in the area of official time, such that its previous decisions on the subject are superseded by section 7131(a) to the extent of any conflict.[36] In the cases cited by BATF, on the other hand, there was no comparable repudiation by Congress of a past policy so integrally related to the issue under consideration. Accordingly, the general principles of statutory construction in which BATF places great stock are inapplicable in this case.

3. Considerable reliance is also placed by BATF, at Br. 25-26, 28, on the principle of statutory construction

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[35] Congress' reversal of this policy, and its specific change in sec. 7131(a) as to the amount of official time to be made available to employee union negotiators, calls into question the weight to be given Congressman Udall's statement quoted at Br. 19. While the Labor Statute can generally be said to have codified the "basic framework of collective bargaining" established in Exec. order 10988, the Labor Statute quite obviously effected substantial changes in that order's view of who benefits from collective bargaining in the federal government, and how much official time should be made available by the government for such bargaining.

[36] General Accounting Office Decision No. B-156287 (CFR) (June 15, 1981) states:

> The enactment of Chapter 71, Title 5, as Title VII of the Civil Service Reform Act of 1978, Pub. Law No. 95-454, October 13, 1978 (92 Stat. 1111, 1192), provided a specific statutory provision—5 U.S.C. 7131—for the use of official time in the labor-management area. This provision is more comprehensive and specific than the preexisting provisions of section 20 of Executive Order 11491, *supra*. In view of section 7135(b), providing for supersession of inconsistent provisions of the various Executive orders dealing with labor-management relations, we view section 20 of Executive Order 11491 as having been superseded by the specific provisions of section 7131 of title 5, United States Code. It follows, therefore, that our decisions interpreting the official time provisions of prior Executive orders have also been superseded by section 7131, to the extent of any conflict.

Slip op. at 2.

discussed in *United States* v. *Zazove*, 334 U.S. 602 (1948) and *Pine Hill Coal Co.* v. *United States*, 259 U.S. 191 (1922). Essentially, the principle provides that when a statute may be construed to allow the federal government to assume either greater or lesser amounts of financial liability, Congress' failure to specify clearly the construction resulting in the larger liability will be taken to reflect an intent to assume only the lesser liability, unless "cogent considerations to the contrary" warrant a different result. *United States* v. *Zazove*, 334 U.S. at 616-17.[37]

The principle is inapplicable here for two reasons. First, it has been applied to an extremely limited class of cases, wherein a statute dealing exclusively with financial matters (i.e., insurance benefits, prices of commodities, interest payments, etc.) is at issue.[38] The Labor

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[37] This principle appears to be for use solely in construing a statute where there is no question of the authorization of a government agency or official to expend the funds at issue. It is thus distinct from cases such as *United States* v. *MacCollom*, 426 U.S. 317 (1976), involving an authorization issue which has a constitutional dimension. *See* p. 34, fn. 30, *supra*. The principle is also distinct from the doctrine of sovereign immunity, under which the government may be sued only insofar as it consents to be sued. *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949). In this regard, the present case does not involve a suit against the sovereign or its agent. Rather, this case involves a federal agency's construction of the statute it administers as providing for certain payments, in furtherance of Congress' goals in enacting that statute. Sovereign immunity is inapposite to this kind of situation, and BATF's argument at Br. 27 is accordingly without merit.

[38] The very limited applicability of the principle is demonstrated by the fact that research discloses only six reported cases in which the principle as stated in *Zazove* and *Pine Hill Coal* has been applied: *Brookfield Construction Co.* v. *United States*, 661 F.2d 159, 163-64 (Ct. Cl. 1981); *Schellfeffer* v. *United States*, 343 F.2d 936, 942 (Ct. Cl. 1965); *Maryland Casualty Co.* v. *United States*, 155 F.2d 823, 826 (4th Cir. 1946); *Allen* v. *United States*, 547 F. Supp. 357, 360-61 (N.D. Ill. 1982); *Simmons* v. *United States*, 120 F. Supp. 641, 646-47 (M.D. Pa. 1954); and *Fogarty* v. *United States*, 80 F. Supp. 90, 96 (D. Minn. 1948), *aff'd*, 176 F.2d 599 (8th Cir. 1949), *aff'd*,

Statute obviously does not deal exclusively with financial matters, but rather is aimed at establishing an effective collective bargaining system in the federal government. The principle has never been extended to a case such as this, and no persuasive reason appears for beginning such a practice here.

Second, the principle is not to be applied mechanically. As the Court said in *Zazove*, it is necessary to consider the "full context of related sections of the statute and other indicia of legislative intent," such as legislative history, to determine the proper meaning of a statute. *Zazove*, 334 U.S. at 612. Further, other "cogent considerations" may warrant construing a statute to provide for a liability where there was no express statement from Congress. *Id.* at 617.

In the present case, much of what has already been said demonstrates "cogent considerations" for viewing the Authority's decision as consistent with Congress' intent. In sum, Congress in the Labor Statute rejected the long-held view of the executive branch and the Comptroller General, upon which the travel and per diem prohibition had been based, that collective bargaining benefits unions and not the government. Believing that the collective bargaining process benefits the government as a whole, Congress decided to compensate employee union negotiators for their services by ensuring that an employee would receive a normal day's pay for a day spent in bargaining. The Authority quite logically concluded that Congress also intended to provide the means to reach the site where the services are to be performed. Accordingly, notwithstanding congressional silence on the specific matter, the Authority's decision is consistent with Congress' intent, and nothing in *Zazove* or *Pine Hill Coal* warrants a different conclusion.

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340 U.S. 8 (1950). This Court has not applied the principle other than in *Zazove* and *Pine Hill Coal* themselves. Also, the principle has never been used to defeat an agency's interpretation of the statute it is responsible for administering.

III. Collective Bargaining Negotiations Constitute "Official Business" Of The Federal Government Within The Meaning Of 5 U.S.C. (& Supp. V) 5702, Thus Entitling Employee Union Negotiators To Travel Expenses And A Per Diem Allowance Under That Section

1. The Authority and the court below correctly decided that employee union negotiators are entitled to a per diem allowance and travel costs under 5 U.S.C. (& Supp. V) 5702, as well as under the Labor Statute itself.[39] Section 5702(a) of Title 5 of the Code provides in relevant part that "an employee while traveling on official business away from his designated post of duty . . . is entitled to . . . a per diem allowance." In applying section 5702, the Comptroller General has adopted the pragmatic standard of whether the purpose of the employee's travel is "sufficiently in the interest of the United States so as to be regarded as official business." 44 Comp. Gen. 188, 189 (1964). This standard encompasses more than travel which is directly related to an agency's mission. For example, travel and per diem payments have been made to employees to attend administrative hearings on their own suspensions from duty, personnel grievances, performance rating appeals, etc., on the theory that because such hearings are provided by law they must constitute "official business" of the government. 31 Comp. Gen. 346 (1952). *See also Vitarelli* v. *United States*, 279 F.2d 878, 882 (Ct. Cl. 1960); 33 Comp. Gen 582 (1952); 21 Comp. Gen. 382 (1941). The same benefit to the United States is derived from collective bargaining under the Labor Statute. It is a process provided by law, which has been deemed by Congress to be beneficial for the operation of the federal government. Thus, the Authority

[39] The origin of 5 U.S.C. 5702 is the Travel Expense Act of 1949, Pub. L. No. 81-92, 63 Stat. 166. The act has been amended on numerous occasions since 1949, primarily to increase the maximum amounts payable for travel and per diem costs. However, the relevant provisions discussed here concerning "official business" have remained unchanged since enactment of the 1949 law.

and the court below correctly concluded that collective bargaining under the Labor Statute is "official business" of the government under section 5702, in accordance with cases such as 31 Comp. Gen. 346 (1952).

Further, a considerable amount of official travel in the federal government is to attend conferences, seminars, conventions, etc., many of which are sponsored by private organizations. Comptroller General of the United States, *Travel in the Management and Operation of Federal Programs* 1, App. I at 5 (Rpt. No. FPCD-77-11, Mar. 17, 1977); Comptroller General of the United States, *Proposals for Improving the Management of Federal Travel* 1, 22 (Rpt. No. FPCD-81-13, Dec. 24, 1980). The benefit to the government from such travel would appear to be the ability of government employees to become informed of recent developments in a given subject area, and to use the newly-acquired information to make government more effective and efficient. Similarly, the give-and-take of negotiations on working conditions between agency management and union representatives results in a mutual understanding as to what the "rules of the shop" should be, thereby improving employee morale and productivity, and accordingly agency efficiency and effectiveness. Accordingly, both the Authority and the court below correctly concluded that Congress viewed collective bargaining under the Labor Statute to be "official business" of the federal government, consistent with the meaning of that term in 5 U.S.C. (& Supp. V) 5702.[40]

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[40] BATF's unsupported definition of "official business" (Br. 31) as "work done on behalf of an agency pursuant to a directive from an agency supervisor," would appear to be erroneous based on the foregoing. As indicated, the Comptroller General has viewed the "official business" provision of sec. 5702(a) broadly and flexibly, to encompass what is "sufficiently in the interest of the United States." 44 Comp. Gen. at 189. Further, in cases such as 31 Comp. Gen. 346 (1952), the Comptroller General has recognized that supervisory direction is not an indispensable element of "official business."

2. BATF and courts that have ruled against the Authority have cited the reference in section 7101(a) of the Labor Statute to collective bargaining being in the "public interest" and contributing to the "effective conduct of public business," and distinguished these benefits from the "interest of the Government as employer." Br. 33; *United States Department of Agriculture* v. *FLRA*, 691 F.2d 1242, 1248 (8th Cir. 1982), *petit. for cert. filed sub nom. FLRA* v. *Department of Agriculture*, 51 U.S.L.W. 3625 (Dec. 13, 1982). *See also Division of Military and Naval Affairs, State of New York* v. *FLRA*, 683 F.2d 45, 48 (2d Cir. 1982), *petit. for cert. filed sub nom. FLRA* v. *Division of Military and Naval Affairs, State of New York*, 51 U.S.L.W. 3596 (Dec. 16, 1982). This reasoning proceeds from an erroneous premise as to the benefit derived by the federal government from the collective bargaining process. Congress' intent in the Labor Statute was not to equate the interest of the government exclusively with the management point of view at the bargaining table. Rather, Congress intended the functioning of government to be the beneficiary of the effective operation of the collective bargaining process in its entirety, with contributions from both union and management. Accordingly, to focus on the "interest of the Government as employer" is inconsistent with Congress' intent.[41]

In sum, Congress viewed the "public interest" served by collective bargaining under the Labor Statute as being

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[41] BATF's argument at Br. 33, fn. 23, that collective bargaining is like other "public interest" activities recognized by the government (e.g., voting and donating blood) for which an employee may be excused from work, but does not receive travel and per diem, is without weight. Collective bargaining, unlike the cited activities, directly benefits the government itself by establishing work rules in such a way as to promote employee morale and job performance. As stated by Congressman Clay during floor debates on the Labor Statute, "[t]he public and the taxpayer deserve the more effective and efficient government that is a predictable result of a meaningful labor-management program for Federal agencies." 124 Cong. Rec. 29,187 (1978), Legis. Hist. at 931.

a more efficient and effective federal government. This kind of benefit for the government has consistently resulted in a finding that an activity is "official business" of the government under 5 U.S.C. (& Supp. V) 5702, thus warranting payment of travel and a per diem allowance.[42]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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JUNE 1983

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[42] The claim of BATF at Br. 31, that the Authority's decision is counter to the determination of the Administrator of the General Services Administration that each agency head decide whether a given activity is "official business," is also without merit. The relevant regulation, entitled "Authority For Travel," states in pertinent part: "*Except as otherwise provided by law*, all travel shall be either authorized or approved by the head of the agency or by an official to whom such authority has been delegated. . . ." Federal Travel Regulations FPMR 101-7, GSA Bulletin FPMR A-40, Supp. 1, Chap. 1-1.4 (Sept. 28, 1981) (emphasis added.) The Labor Statute and the Authority's interpretation thereof concerning travel and per diem payments constitutes the requisite authorization for such payments.

STATUTORY APPENDIX

RELEVANT PORTIONS OF THE FEDERAL SERVICE LABOR MANAGEMENT RELATIONS STATUTE

5 U.S.C. 7101 *et seq.*, 92 Stat. 1191

"§ 7101. Findings and purpose

"(a) The Congress finds that—

"(1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

"(A) safeguards the public interest,

"(B) contributes to the effective conduct of public business, and

"(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

"(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

"(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

"§ 7105. Powers and duties of the Authority

"(a)(1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this chapter.

"(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

"(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

"(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

"(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

"(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

"(E) resolves issues relating to the duty to bargain in good faith under section 7117(c) of this title;

"(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

"(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

"(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

"(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

§ 7116. Unfair labor practices

"(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

"(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

"(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

"(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

"(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

"(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

"(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

"(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the agreement was in effect before the date the rule or regulation was prescribed; or

"(8) to otherwise fail or refuse to comply with any provision of this chapter.

"(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization—

"(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

"(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

"(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

"(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

"(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

"(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

"(7) (A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an agency in a labor-management dispute if such picketing interferes with an agency's operations, or

"(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

"(8) to otherwise fail or refuse to comply with any provision of this chapter.

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

"§ 7123. Judicial review; enforcement

"(a) Any person aggrieved by any final order of the Authority other than an order under—

"(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

"(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States of Appeals for the District of Columbia.

"(b) The Authority may petition any appropriate United States court of appeals for the enforcement of any order of the Authority and for appropriate temporary relief or restraining order.

"(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall

be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its findings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

"(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this sec-

tion if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

"§ 7131. Official time

"(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

"(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status.

"(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

"(d) Except as provided in the preceding subsection of this section—

"(1) any employee representing an exclusive representative, or

"(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

RELEVANT PORTION OF THE TRAVEL EXPENSES ACT OF 1949, AS AMENDED 5 U.S.C. (& Supp. V) 5701 *et seq.*

5 U.S.C. (Supp. V) 5702(a)

Under regulations prescribed under section 5707 of this title, an employee while traveling on official business away from his designated post of duty, or in the case of an individual described under section 5703 of this title, his home or regular place of business, is entitled to (1) a per diem allowance for travel inside the continental United States at a rate not to exceed $50, and (2) a per diem allowance for travel outside the continental United States, that may not exceed the rate established by the President, or his designee, for each locality where travel is to be performed. For travel consuming less than a full day, such rate may be allocated proportionately.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,

Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY AND NATIONAL TREASURY EMPLOYEES UNION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT NATIONAL TREASURY EMPLOYEES UNION

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QUESTION PRESENTED

Whether Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. V) 7131(a), requires that a federal agency pay a per diem allowance and travel expenses to employee union representatives engaged in collective bargaining with the agency.

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In providing "official time" for employees negotiating collective bargaining agreements for unions under 5 U.S.C. (Supp. V) 7131(a), Congress designated such work as official government duty and thus invoked the travel and per diem provisions of 5 U.S.C. (Supp. V) 5702 16

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-799

BUREAU OF ALCOHOL, TOBACCO
AND FIREARMS,

Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY AND
NATIONAL TREASURY EMPLOYEES UNION

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT NATIONAL TREASURY EMPLOYEES UNION

STATEMENT

A. Statutory Background

1. Congress enacted the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 ("the Act") in October, 1978. That Act contains the first statutory program

governing labor-management relations in the federal sector. Title VII of the Act, 5 U.S.C. (Supp. V) 7101 *et seq.*, replaced the labor relations program previously maintained under Presidential Executive Orders.[1]

In Title VII, Congress for the first time declared that "labor organizations and collective bargaining in the civil service are in the public interest." 5 U.S.C. (Supp. V) 7101(a). After conducting extensive public hearings, Congress declared that, based on "experience in both private and public employment," a statutory collective bargaining system would "contribute[] to the effective conduct of public business" and "facilitate[] and encourage[] the amicable settlements of disputes" between the government and its employees. In Title VII, Congress devised a comprehensive collective bargaining program for federal employees and established an independent Federal Labor Relations Authority ("FLRA" or "the Authority") to supervise the federal sector collective bargaining process. The FLRA, which is modeled largely on the private sector's National Labor Relations Board, has full authority, *inter alia*, to issue orders against unfair labor practices (5 U.S.C. (Supp. V) 7118) and to seek enforcement of those orders in appropriate United States courts of appeals (*id.* 7123(b)). Persons aggrieved by any final FLRA order may seek judicial review in the court of appeals. *Id.* 7123(a).

At issue in the instant unfair labor practice proceeding is the FLRA's interpretation of the Act's requirement that agencies must grant "official time" to employee represen-

[1]The program was created in 1962 by Exec. Order No. 10988, 3 C.F.R. 521 (1959-1963 Compilation). It was revised by Exec. Order No.11491, 3 C.F.R. 861 (1966-1970 Compilation), which was in turn amended by Exec. Orders Nos. 11616, 11636, and 11838, 3 C.F.R. 605, 634 (1971-1975 Compilation) and 3 C.F.R. 957 (1971-1975 Compilation).

tatives negotiating collective bargaining agreements. Specifically, the Authority has construed this grant of official time as including travel expenses. The provision at issue specifies that "[a]ny employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status." 5 U.S.C. (Supp. V) 7131(a). In addition to this mandatory provision, the section also allows for permissive official time. An agency and union may agree to the use of official time for representational activities when appropriate in contexts outside collective bargaining negotiation. *Id.* 7131(d).

Congress used the term "official time" in a context where there already existed a long-standing statute providing travel expenses or per diem allowances for all trips on "official business" and for "official travel." The Travel Expense Act of 1949, as amended,[2] provides a specified per diem allowance for any employee "traveling on official business away from his designated post of duty" or reimbursement for actual expenses of such "official travel." 5 U.S.C. (Supp. V) 5702(a) and (c). Thus, Congress mandated "official time" for employee representatives negotiating collective bargaining agreements under the Civil Service Act where a pre-existing statute provided travel expenses or per diem allowances for any employee traveling on "official business" or embarked on "official travel."

[2]The 1949 Act had its origin in the Subsistence Expense Act of 1926, which first provided travel expenses for federal employees traveling on "official business." Ch. 457, 44 Stat. 688.

Finally, outside the negotiating arena, Title VII vests the FLRA with power to determine when employees are entitled to "official time" for participating on behalf of unions in proceedings before that body. 5 U.S.C. (Supp. V) 7131(c). The FLRA's predecessor in this regard was the Assistant Secretary of Labor for Labor-Management Relations, who conducted proceedings under the Executive Order Programs. See Section 6, Exec. Order 11491, *supra*. The Assistant Secretary's long-standing regulations provided "official time" for employees who were necessary witnesses at hearings and expressly provided that "necessary transportation and per diem expenses shall be paid by the employing agency or activity." 29 C.F.R. 206.7(g) (1974 Compilation). Thus, Congress gave the FLRA authority in Title VII to grant official time for employee representatives participating in administrative proceedings where the official time previously given for employee participation in such proceedings had included travel expenses.

2. In order to understand the context in which Congress designated "official time" for employee representatives, it is necessary to trace the history of the use of such time under the Executive Order programs. Much of this history is set out in a series of reports by a study committee and by the Federal Labor Relations Council ("FLRC"), the Authority's predecessor under the Executive Orders. These reports were before the 95th Congress as it deliberated regarding the official time provisions of Title VII. Study Committee Report and Recommendations, August 1969; Federal Labor Relations Council, Report and Recommendations on the Amendment of Executive Order 11491; Federal Labor Relations Council, Report and Recommendations on the Amendment of Executive Order 11491, as amended (*Legis. Hist.* 1218-1243; 1258-1267; 1283-1335).[3]

[3]The reports are reprinted in Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service,

The original (1962) labor-management relations Executive Order allowed agencies to require all collective bargaining negotiations to be conducted on non-duty hours.[4] The Comptroller General[5] concluded that the decision to allow agencies to require negotiations during off-duty hours meant that negotiations by employee representatives were "outside the regular tour of duty" and were "not to be regarded as official business of the Government." 44 Comp. Gen. 617, 618 (1965). He therefore ruled that traveling expenses were not authorized under the Travel Expense Act and were not payable from government funds. Similarly, he ruled that government payment of travel expenses of employee representatives was not authorized for general attendance of meetings or consultations held pursuant to the Executive Order because such attendance was "to further the interests of the [labor] organization," rather than the government. 45 Comp. Gen. 454, 455 (1966). The Comptroller General retreated somewhat, however, in deference to the guidelines devised by the Civil Service Commission, the agency then charged with overseeing labor-management issues. He sanctioned

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96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978* (Comm. Print 1979) ("*Legis. Hist.*").

[4]Section 9 of Exec. Order 10988, *supra*, provided *inter alia*:

> Officially requested or approved consultations and meetings between management officials and representatives of recognized employee organizations shall, whenever practicable, be conducted on official time, but any agency may require that negotiations with an employee organization which has been accorded exclusive recognition be conducted during the non-duty hours of the employee organization representatives involved in such negotiations.

[5]As discussed *infra* p. 36, the Comptroller General was denied a role in authorizing expenditures involved in FLRA proceedings under the Civil Service Reform Act.

the Commission's proposed guidelines authorizing travel expenses in certain circumstances under the limited Executive Order program. 46 Comp. Gen. 21 (1966). The Commission would generally deny travel expenses for employee representatives negotiating agreements. But an agency would have "the latitude to pay travel expenses where particular circumstances justify the payment," *e.g.*, where the government held a meeting at a particular site chosen for economic considerations. *Id.* at 21-22. The Comptroller General deferred to the Commission's expertise as to what payment of travel expenses could be viewed as "essential to the fulfillment of the objective of employee-management cooperation" contemplated by the Executive Order. *Id.* at 22.

In 1969, an official study committee issued a report on the Executive Order program and made recommendations for changes. As to the use of official time for negotiations, the committee noted a lack of uniformity – some agencies allowed, and some disallowed, official time. It recommended that the Executive Order be changed to deny any official time to employee representatives when negotiating agreements. The committee reasoned that "an employee who negotiates an agreement on behalf of a labor organization is working for that organization, and should not be in a duty status when so engaged." *Legis. Hist.* 1236. Accordingly, the new Executive Order provided that "[e]mployees who represent a recognized labor organization shall not be on official time when negotiating an agreement with agency management." Section 20, Exec. Order No. 11491, *supra*.

This flat prohibition against use of official time for negotiations, however, proved unsatisfactory. In 1971, the FLRC issued its first report on the Executive Order pro-

gram. The FLRC noted that this "controversial" policy prohibiting official time had "unfavorable effects on the negotiation process," producing "difficulties in scheduling negotiation sessions, and delays in completing negotiations because of a union's inability to provide representation." *Legis. Hist.* 1264-1265. Balancing these adverse consequences against some discerned benefits, the FLRC came out in favor of lifting the prohibition against official time. Its recommended change, however, was quite limited. The new approach would "permit the negotiating parties, when circumstances warrant, to agree to a reasonable amount of official time for employees who represent the union in negotiations during regular working hours." The proposed change was intended to "promote responsible collective bargaining" and "avoid undue hardship or delay in negotiations." But the use of official time would still be strictly limited in an attempt to foster "union self-support" and provide incentives "to economical and business-like bargaining practices." *Id.* at 1265. It was under this quite limited approach that the Council declared that "[o]vertime, premium pay, or travel expenditures are not authorized." *Id.* at 1264.

The President adopted the Council's proposals and revised the Executive Order to allow parties to negotiate official time within prescribed limits. Employees could, at the most, obtain official time "for up to 40 hours or ... up to one-half the time spent in negotiations during regular working hours." Section 20, Exec. Order 11616, *supra.* The last FLRC Report noted that negotiations over official time had caused some problems and delays.* But the

*The Report also noted Council approval of the Assistant Secretary's regulations granting official time – which included travel expenses – for employees appearing as witnesses at hearings. *Legis. Hist.* 1334.

Council recommended no change, concluding that the official time policy on balance fostered effective negotiations while "minimizing financial hardships on individual employees." *Legis. Hist.* 1334-1335. The policy therefore remained unchanged until Congress enacted 5 U.S.C. (Supp. V) 7131(a), providing *mandatory* official time for *all* negotiations.

B. Proceedings Below

1. The facts giving rise to this unfair labor practice proceeding are not in dispute. Petitioner Bureau of Alcohol Tobacco and Firearms ("Bureau") maintained an area office of its Western Region in Lodi, California. Respondent National Treasury Employees Union ("NTEU") was the exclusive representative for the employees at this office. In November, 1978, the Bureau notified the affected NTEU Chapter that it intended to relocate the Lodi office to Sacramento, California (about 34 miles away) and establish a reduced Post of Duty Office at another location in Lodi (Pet. App. 22a; Jt. Exh. 1 at R. 111[7]). The action would require relocating nine employees from Lodi to Sacramento. NTEU advised the Bureau that it wished to negotiate the move, or alternatively, negotiate the impact the move would have on bargaining unit employees. The union named Donald Pruett, a steward in NTEU's Fresno Area Office, to represent NTEU in the matter (*ibid.;* Jt. Exh. 2 at R. 112). As the administrative law judge subsequently found, the Bureau decided "that since Pruett and [the Bureau's] own Chief of Field Operations, Thomas Crone, had not yet seen the facilities under discussion, it

[7] "R" refers to the Record of the FLRA.

would be to everyone's best interest to conduct the negotiations and view the various new facilities at the same time" (Pet. App. 22a; See R. 147). Thus, the Bureau's Personnel Specialist informed Pruett that the negotiating parties would all travel to the site of the new Sacramento office, meeting at 9:30 a.m. on February 23, 1979 (Pet. App. 22a-23a).

At this Sacramento meeting, Pruett represented NTEU, while management was represented by the Personnel Specialist, the Chief of Field Operations and two other management employees. The group examined the future work space, cafeteria facilities and parking facilities. They discussed matters such as where office walls should be built, location of work desks, access to restrooms and to parking. The group next proceeded to Lodi, where they had lunch and then met at the new Lodi office to examine and discuss those facilities. They then adjourned to the old Lodi Area Office and further discussed the impact of the planned move and, specifically, the various proposals that the union had submitted. Pruett generally expressed satisfaction with the new facilities except for the parking arrangements at Sacramento, and management agreed to continue to try to obtain closer parking space (Pet. App. 24a-25a). The parties also discussed leave adjustments for newly transferred employees encountering commuting problems and arrangements for two employees involuntarily reassigned (*Id.* at 26a; R. 144). Management agreed to hold group meetings for affected employees and to meet separately with the two involuntarily transferred workers to discuss anticipated assignments (*ibid.*).

The day of the meetings, Pruett left his home in Madera, California at 6:15 a.m. and returned at 5:45 p.m., driving a total of 303 miles in his own car (Pet. App. 25a n.7). Two days beforehand, he had requested to be

paid for the time spent at the meetings.[8] But the Bureau denied his request and instructed him to take either annual leave or leave without pay for the day. Management informed him in writing that its employees could not receive official time or excused leave for midterm negotiations "or reimbursement for any expenses in connection with Midterm negotiations" (Pet. App. 23a n.5; Jt. Exh. 4 and 5 at R. 114, 115). Accordingly, Pruett used eight hours of annual leave for February 23 (Pet. App. 23a n.5).

NTEU filed an unfair labor practice charge in June 1979, and the FLRA General Counsel subsequently issued a complaint, based on the Bureau's failure to grant Pruett official time and travel and per diem expenses for the February 23 negotiations. After a hearing, the administrative law judge ("ALJ") concluded that the Bureau's action did constitute an unfair labor practice in violation of 5 U.S.C. (Supp. V) 7116, relying on an Interpretation and Guidance issued by the FLRA, 2 F.L.R.A. No. 31 (1979).

In that Interpretation and Guidance, the Authority had concluded that 1) the official time provisions of Section 7131(a) of the statute encompass all collective bargaining, including mid-term negotiations[9] and 2) employees on official time under Section 7131(a) are entitled to payments from the agency for travel and per diem expenses. As to travel expenses, the FLRA reasoned that it was equated with "paid time" and, thus, an employee negotiating a con-

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[8]Specifically, he asked that the meeting be incorporated with a "quarterly" meeting under the collective bargaining agreement or that he be permitted to take "bank time" for the period (Pet App. 23a).

[9]The Bureau has not sought review of the decision that mid-term negotiations, such as those involved here, are covered under Section 7131(a) in addition to negotiations of a basic collective bargaining agreement.

tract "is not in leave status" (Pet. App. 42a). The Authority noted that Congress rejected the Executive Order's restricted use of official time, under which travel expenses were not allowed (*id.* at 42a n.6).

While neither the statute nor legislative history expressly adverted to travel expenses, the Authority noted, "it is well established that such expenses are authorized when an employee 'is engaged on official business for the Government' " under 5 U.S.C. (Supp. V) 5702 (the Travel Expense Act). Because Congress declared in the Civil Service Reform Act that collective bargaining furthered the effective conduct of "public business" and was in the "public interest," the FLRA concluded that an employee negotiating an agreement "while on paid time entitled to his or her usual compensation and not in a leave status, is clearly engaged on 'official business for the Government' " (Pet. App. 43a). Moreover, Congress indicated its intent that union representatives be given similar prerogatives to that of management representatives, who are uniformly paid transportation and per diem expenses (*id.* at 43a). Payment of travel expenses would "more nearly equate the status of union and management negotiators as contemplated by Congress" and would also serve the declared statutory purpose by facilitating more effective union representation at the bargaining table (*id.* at 44a). The Authority also noted that provision of travel expenses under 713(a) comported with the Authority's unchallenged regulations authorizing such expenses for witnesses at FLRA proceedings, whenever they were given official time under Section 7131(c) (Pet. App. 44a-45a).

In the instant proceeding, the FLRA summarily affirmed the ALJ's decision, adopting his findings and conclu-

sion regarding the unfair labor practice charge against the Bureau (Pet. App. 15a-17a). The Bureau petitioned for review in the United States Court of Appeals for the Ninth Circuit, which affirmed the FLRA's decision as "reasoned and supportable" regarding both official time and travel expenses (*id.* at 5a). The Court noted that the FLRA issued its Interpretation pursuant to its statutory authority to provide leadership in establishing policies and guidelines and to carry out the purposes of Title VII (Pet. App. 4a; 5 U.S.C. (Supp. V) 7105(a)(1)). The court agreed that union negotiators on official time "should be interpreted to be on official government business within the meaning of 5 U.S.C. § 5702(a)," in light of Congress's declaration that collective bargaining contributes to the effective conduct of public business. "[L]abor representatives should be treated similarly to other government employees conducting business for the government" (Pet. App. 10a). It further agreed that this construction comported with Congress's decision that the positions of management and labor should be equalized with regard to collective bargaining (*ibid.*). Finally, the court rejected the Bureau's contention that availability of expenses would impair the willingness of union negotiators to reach agreement. The court noted the statute's good faith negotiation requirement and provisions for impasse proceedings, as well as the fact that the FLRA's interpretation "yields no more advantage to labor negotiators than that formerly possessed by management negotiators" (*Id.* at 11a).

SUMMARY OF ARGUMENT

The court of appeals correctly affirmed the FLRA's reasoned interpretation of the official time provision of the Civil Service Reform Act. In 5 U.S.C. (Supp. V) 7131(a), Congress designated all negotiation of collective bargaining agreements as official government duty, thus invoking the travel allowance and per diem provision of the Travel Expense Act, which provides reimbursement for "official business" and "official travel." 5 U.S.C. (Supp. V) 5702(a) and (c).

Congress deliberately rejected past approaches and notions under the Executive Order programs, which had restricted official time and travel expenses. Under the new statute, for the first time union representatives were provided official time for any and all time spent negotiating agreements. The statute declared collective bargaining to be "in the public interest," contributing to "the effective conduct of public business." 5 U.S.C. (Supp. V) 7101(a). Congress strengthened the collective bargaining program to achieve substantial benefits for the government in the form of increased labor harmony and productivity. Instead of being outside an employee's regular tour of duty, collective bargaining for a union was now recognized as properly done while on official duty status. Instead of being viewed as performed only in the interest of the union, collective bargaining was now recognized as performed in the government's interest. Travel expenses were thought inappropriate for collective bargaining under an Executive Order where official time was only a matter of negotiation, subject to strict limits. But Congress now designated bargaining the official work of the government, thus invoking the provisions of the Travel Expense Act. Congress intended union negotiators to be allowed official time on

the same terms as management, *i.e.*, including travel expenses and per diem allowances.

Duties for which Congress provides "official time" are properly viewed as official government business, unlike activities for which excused "leave" is provided. Official time status means that an employee carries the normal attributes of employment. No leave is required, there is no loss of seniority for purposes of annual and sick leave accumulation, or reduction-in-force retention standing, or retirement status. The employee would be deemed engaged "in the performance of his duty" for purposes of the Federal Employee Compensation Act, and almost surely as "acting within the scope of his office of employment" for purposes of the Federal Tort Claims Act. 5 U.S.C. (Supp. V) 8101 *et seq;* 28 U.S.C. (Supp. V) 1346(b). Congress provides "official" duty status for activities directly related to the government's business and allows only "leave" for other types of activities that are to be encouraged, but not to be viewed as the government's business.

Employer payment of the travel expenses of union negotiators is entirely consistent with the federal sector labor-management scheme. Congress chose to promote and actually subsidize federal employee unions for cogent policy reasons designed to achieve the desired benefits of collective bargaining. Congress wanted a strong collective bargaining program in order to obtain higher productivity from the federal workforce. But providing federal employees with the input needed for better labor relations proved difficult where Congress also chose to grant employee organizations a narrow role. In addition, federal employee unions were given heavy responsibilities on behalf of all employees without the economic advantage of an "agency shop." To counter such disadvantages, Con-

gress opted to provide benefits for unions and actually underwrite some representation costs in the federal sector, in a manner unknown in the private sector.

Congress left statutory construction issues such as this one to the expertise of the FLRA, which properly exercised its authority in this case. The decision is in full accord with statutory construction principles. It reasonably interprets legislative intent in light of Congress's rejection of prior practices. It broadly construes remedial legislation to further the important statutory purposes of encouraging collective bargaining and correcting past inequalities favoring management. The decision comports with congressional intent to provide union negotiators with official time "just as" for management negotiators, who receive travel expenses. Finally, the decision interprets the statute "in a manner consistent with the requirement of an effective and efficient Government." 5 U.S.C. (Supp. V) 7101(b). The interpretation puts the union on a more equal footing with management, which may choose at will to travel for negotiations. Yet the statute provides sufficient restrictions on official time and adequate checks against abuses in order to promote cost-efficient collective bargaining.

ARGUMENT

IN PROVIDING "OFFICIAL TIME" FOR EMPLOYEES NEGOTIATING COLLECTIVE BARGAINING AGREEMENTS FOR UNIONS UNDER 5 U.S.C. (SUPP. V) 7131(a), CONGRESS DESIGNATED SUCH WORK AS OFFICIAL GOVERNMENT DUTY AND THUS INVOKED THE TRAVEL AND PER DIEM PROVISIONS OF 5 U.S.C. (SUPP. V) 5702.

A. In Enacting 5 U.S.C. (Supp. V) 7131(a), Congress Rejected All Past Notions Restricting Official Time and Travel and Designated Collective Bargaining Negotiations As the "Official" Work of the Government.

The Civil Service Reform Act marked a significant departure from past treatment of collective bargaining in general and official time for negotiations in particular. Before passage of this Act, there was no legislative or executive decision that collective bargaining in the federal sector was in the public interest and no *requirement* that an employee negotiating for a union be granted *any* official time. After extensive public hearings, in-depth consideration of past practices, and lengthy deliberations, Congress chose to treat the collective bargaining process entirely differently under the new statute than under the old Executive Order programs. The FLRA, charged with establishing statutory policies and carrying out the purposes of the Act, has given the most reasonable construction of the "official time" provision: Congress deemed negotiation of collective bargaining agreements to be the official work of the government within the meaning of the pre-existing travel and per diem statutory provisions. The court below correctly affirmed the FLRA's "clearly defensible" interpretation of the statute (Pet. App. 11a).

The language and history of Section 7131(a) support the FLRA's construction that employees negotiating collective bargaining agreements are entitled to both official time and travel expenses. Congress had long provided a per diem allowance to any employee "traveling on official business away from his designated post of duty" or reimbursement of actual expenses of "official travel." 5 U.S.C. (Supp. V) 5702(a) and (c).[10] With this treatment of "official business" and "official travel" already in place, Congress designated collective bargaining negotiation as work performed in the government's interest. For the first time, it mandated that employees be given "official time" for any and all time spent negotiating agreements. Congress thus put such employees on official duty status without qualification.[11] The statute itself declares for the first time that "collective bargaining in the civil service [is] in the public interest"[12] and "contributes to the effective conduct of public business." 5 U.S.C. (Supp. V) 7101(a). Congressman William Ford, a member of the House conference committee and one of the leading proponents of the legislation, described Title VII as imposing "obligations on employee representatives that serve both the public interest and the public business." 124 Cong. Rec. 38718 (1978); *Legis. Hist.* 999-1000.[13] Indeed, the legislative history is replete with descriptions of the benefit the government would derive from collective bargaining in

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[10]See *supra* n. 2, at p. 3.

[11]See *infra* n. 15, at pp. 26-27.

[12]The Second Circuit demonstrably erred in concluding otherwise. *Division of Military and Naval Affairs v. FLRA*, 683 F.2d 45, 48 (1982), petition for cert. pending, No. 82-1021 (filed Dec. 16, 1982).

[13]The D.C. Circuit has properly given these remarks by Congressman Ford significant weight in construing the statute in another context. *American Federation of Government Employees v. FLRA*, 702 F.2d 1183, 1187-1188 (1983).

terms of increased harmony, cooperation and productivity. See, *e.g.*, 124 Cong. Rec. 29186 (1978) (statement of Rep Clay); *id.* at 29197 (statement of Rep. Ford); 123 Cong. Rec. 8524 (1977) (statement of Sen. Inouye); *Legis. Hist.* 931, 953, 1005; Report of the President's Task Force on Employee Management Relations in the Federal Service, *Legis. Hist.* 1188, 1190, 1194.

This statutory treatment of labor-management relations stands in sharp contrast to the view of collective bargaining negotiation under the discarded Executive Order program. Under the Executive Orders, there was no declaration – and certainly no *congressional* proclamation – that collective bargaining furthered the government's interest. Moreover, Congress chose to deal with the negotiation of collective bargaining agreements by employee representatives in an entirely different manner than under the presidential program, where such work was deemed to be rightfully outside regular duty and done in the interests of the unions and not the government. For this reason, the Bureau is simply wrong in maintaining (Br. at 17-18) that Congress ratified or codified a previous practice against providing travel expenses for employee representatives. The fact is that Congress rejected all prior approaches and, with them, certain propositions, in favor of a new attitude toward negotiations by employee representatives.

First of all, there is no indication that Congress even considered the first Executive Order approach where an agency could require that all negotiations be done on off-duty hours. Under this approach, the Comptroller General had first disallowed any travel expenses; he reasoned that the President's decision that agencies could require all negotiating done on an employee's own time meant that the work was "outside the regular tour of duty" and was intended "not to be regarded as official business of the

Government." 44 Comp. Gen., *supra,* at 618. He also reasoned that negotiations or consultations under this limited program consisted of duties performed "primarily in the interest of the employee organization" and not on the government's behalf. *Ibid;* 45 Comp. Gen., *supra,* at 455-456. It was in this context that the Comptroller General ruled that the work was not "official business" within the meaning of the Section 5702 authorization of travel expenses. But even under this severely limited scheme, the Comptroller General later retreated in deference to travel expense guidelines by the agency charged with responsibility for implementing the labor-management program. The Comptroller General deferred to the Civil Service Commission's guidelines, which would allow travel expenses under limited circumstances. For example, the Civil Service Commission said that payment of employee representatives' travel expenses would be justified when the agency chose the site for its own economy and convenience, much like the circumstances in the present case where the agency decided that it was in the best interest of all to begin negotiations at the sites of new facilities. 46 Comp. Gen., *supra,* at 21-22. Such limited travel expenses were available even where there was no requirement that any negotiations be allowed on official time.

Similarly, there is no evidence that Congress considered the second approach tried under the Executive Orders, where official time for negotiations was flatly prohibited. The study committee that issued a report leading to the issuance of Executive Order 11491 had recommended this prohibition reasoning that "an employee who negotiates an agreement on behalf of a labor organization is working for that organization, and should not be in a duty status when so engaged." *Legis. Hist.* 1236. This reasoning was obviously discarded under the new statutory program.

Finally, Congress did explicitly consider and reject the last approach under the Executive Order, which allowed the parties to negotiate for official time. Under this limited scheme, an employee representative could try to negotiate official time for up to 40 hours or one-half the time spent on collective bargaining. The FLRC had stated that "travel expenditures are not authorized" under this very restricted provision. *Legis. Hist.* 1264. The Bureau and the Eighth and Eleventh Circuits have latched onto this single declaration to argue that Congress implicitly ratified the old policy against agency payment of travel expenses. See *United States Department of Agriculture* v. *FLRA*, 691 F.2d 1242, 1245 (8th Cir. 1982), petition for cert. pending, No. 82-979 (filed. Dec. 13, 1982); *Florida National Guard v. FLRA*, No. 81-5466 (11th Cir. Mar. 7, 1983) slip op. 1884. However, this contention – the keystone to the Bureau's argument – fails for a simple reason. There was no such ratification of past practices because Congress completely rejected the Executive Order's treatment of official time. The "ratification" principle upon which the Bureau relies (Br. 17-18) does not apply. "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change [citations omitted]." *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978). Different inferences are to be drawn, however, where Congress rejects prior practices and enacts a significantly different provision.

Congress considered, but rejected, the last Executive Order's limited authorization of official time. For its new statutory program, Congress chose instead to provide that *all* time spent in negotiation would be on official time, not just whatever the parties could agree to, in negotiation, up to a specified limit. The original Senate bill contained an official time provision identical to Section 20 of Exec.

Order 11491. S. Rep. No. 95-969, 95th Cong., 2d Sess.112; *Legis. Hist.* 772. But Congress opted in favor of the House version, containing what is now section 7131(a). H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 58; *Legis. Hist.* 704. Congressman William Clay, another member of the conference committee and proponent of the legislation,[14] described the official time provision, noting that Title VII imposes heavy responsibilities on labor organizations as well as on management. He stated that "[t]hese organizations should be allowed official time to carry out their statutory representational activities *just as management uses official time* to carry out its responsibilities." 124 Cong. Rec. 9638; *Legis. Hist.* 934. Official time for management representatives engaged in collective bargaining, of course, carries with it the automatic right to travel expenses under 5 U.S.C. (Supp. V) 5702. There is no question but that management representatives perform official government business when assigned bargaining duties.

It can thus properly be said that Congress rejected certain attitudes under the old Executive Order scheme and adopted new ones. It rejected the idea that collective bargaining is not done in the interest of the government and is therefore outside an employee's regular tour of duty. It rejected the notion that employee representatives negotiating agreements are working for the union rather than the government and for that reason should not be carried on duty status. And it clearly discarded the practice of providing only that official time (subject to limits)

[14]The Bureau tries (Br. 35 n. 24) but fails to find a reason to reject Representative Clay's characterization of official time. There may be reason to decline to give weight to those who sponsor legislation significantly different from that eventually enacted. See *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 11 (1968). But Representative Clay endorsed the precise version of the legislation that ultimately was enacted as Section 7131(a). He merely wanted to extend the same official time treatment to the conduct of internal union business, a policy rejected by Congress.

to which the parties could agree. It was only this rejected approach that did not provide for agency payment of travel expenses. Congress's new decision that all negotiation is entitled to official time signifies that such work is the work of the government, done in the government's interest and properly performed within an employee's regular tour of duty. As such, the work is rightfully characterized as "official business" of the government for all purposes, including the travel expense provision of 5 U.S.C. (Supp. V) 5702.

Congress was demonstrably conscious of Section 5702's provision of travel expenses for "official" business and of the relationship between official time and travel expenses. In fact, it assumed that travel expenses would accompany any time spent on official government business. The Civil Service Reform Act provides for resort to the Federal Service Impasses Panel when the collective bargaining process breaks down. 5 U.S.C. (Supp. V) 7119. Such impasse proceedings are explicitly included in the collective bargaining negotiations for which official time is authorized under Section 7131(a). Section 7119(c)(4) provides that each member of the Panel who is not a federal employee is entitled to specified compensation for each day engaged in performance of "official business of the Panel, including travel time, and is entitled to travel expenses as provided under Section 5703 of [Title 5]." This provision of the Travel Expense Act grants expenses to intermittent government employees, and Congress needed to incorporate Section 5703 for those Panel members who were not otherwise employed by the government. Section 7119(c)(4) noted what is implicit in the statute: "A member of the Panel who is a Government employee is not entitled to any additional pay, but is entitled to travel expenses and a per diem allowance." H.R. Rep. No. 95-1403, *supra*, 54;

Legis. Hist. 700. It is clear, therefore, that Congress was aware of the relationship between official business and travel expenses for federal employees when it designated "official time" for union negotiators.

Congress may also be imputed with specific knowledge that "official time" would carry with it rights to travel expenses. Section 7131(c) directs the FLRA to "determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status." There was useful legislative background regarding official time and travel expenses for such administrative proceedings. The FLRA's predecessor in this area was the Assistant Secretary of Labor for Labor-Management Relations, who conducted hearings under the Executive Order program. See Section 6, Exec. Order 11491, *supra*. The Assistant Secretary had promulgated regulations regarding official time and travel. These rules, affirmed by the FLRC, were noted in the FLRC reports contained in the Civil Service Reform Act's legislative history. *Legis. Hist.* 1334. In language very similar to Section 7131(a) and (c), the Assistant Secretary's published regulations provided official time for hearing witnesses "for such participation as occurs during their regular work hours and when they would otherwise be in a work or paid leave status." The regulations specified that such official time included travel time and that "necessary transportation and per diem expenses shall be paid by the employing agency or activity." 29 C.F.R. 206.7(g) (1974 Compilation). See also *id.* 202.17(h) (official time and travel expenses for employees serving as authorized representation election observers).

Thus, there was precedent in the legislative history of Section 7131 provisions for granting travel expenses for "official time" spent in labor relations activities. Under 7131(c), the FLRA has issued interim regulations providing for travel expenses whenever it grants official time to union representatives participating in its proceedings. 44 Fed. Reg. 44771 (July 30, 1979). The Authority properly relied on its Section 7131(c) rulings in its Interpretation providing travel expenses for Section 7131(a) official time (Pet. App. 44a-45a, 9a). Given the historical precedence for official time and travel under the Assistant Secretary's regulations, the Eighth Circuit erred in dismissing the FLRA's analogy to travel expenses pursuant to Section 7131(c). See *United States Department of Agriculture* v. *FLRA, supra,* 691 F.2d at 1250 n.18.

B. Designation of "Official Time" Signifies That the Work Is Official Government Business, Unlike Activities Done On Excused or Administrative Leave.

Congress used the term "official time" rather than providing "leave" for employee representatives engaged in negotiations. "Leave" status would have clearly conveyed that the employees were not performing government business while negotiating. The FLRA correctly reasoned, however, that an employee negotiating an agreement "while on paid time entitled to his or her usual compensation and not in a leave status, is clearly engaged on 'official business for the Government' " (Pet. App. 43a). The designation of official time rather than excused leave status is crucial. The government is not merely excusing an employee's absence from work to allow performance of some other worthwhile function without loss of pay. Rather, Congress has designated the task at hand as "official" – itself the work of the government, carrying all at-

tributes of employment. No reason exists, in law or policy, to carve out the single attribute of travel expense entitlement while an employee possesses all the other characteristics of employment.

Official time status means that the employee is treated as doing the government's work for all the usual purposes. No leave is required – annual, administrative, or leave without pay. The time spent in collective bargaining is credited for accrual of annual leave, sick leave, reduction-in-force retention standing and retirement. See Office of Personnel Management, Federal Personnel Manual, FPM Supp. 296-33, subch. 6, S6-1.5 (April 30, 1981); *Id.* Supp. 831-1, subch. S2. (Sept. 21, 1981).

Other attributes of employment also attach to an employee on official time. For example, the Federal Employee Compensation Act, 5 U.S.C. (Supp. V) 8101 *et seq.* (FECA) provides workers' compensation for disability or death of an employee resulting from injury "sustained while in the performance of his duty." 5 U.S.C. (Supp. V) 8102(a). The Secretary of Labor has exclusive, unreviewable authority to determine the scope of FECA coverage. *DiPippa* v. *United States,* 687 F.2d 14, 16 (3rd Cir. 1982); *Wallace* v. *United States,* 669 F.2d 947, 951 (4th Cir. 1982). Even under the former Exec. Order 10988 program, where official time was allowed but not required, the U.S. Department of Labor determined that an employee representative was covered while engaged in negotiations. FECA Program Memorandum No. 39, dated July 19, 1965 (attached as an addendum to this brief) provided that "a Federal employee will be in the performance of duty for the purposes of the FECA while he travels to or from or while he attends a negotiating session as a representative of a union," provided that the session is held pursuant to the Executive Order and the activi-

ty was "a necessary or reasonable incident of the travel or the meeting." Thus, an employee granted official time by Congress under Section 7131(a) would surely be covered under FECA as being engaged "in the performance of his duty" while negotiating an agreement.

Similarly, the Federal Torts Claims Act, 28 U.S.C. (Supp. V) 1346(b) would almost certainly apply. Under that Act, the federal government is liable for damages caused by the negligence of "any employee of the Government while acting within the scope of his office or employment," in the same manner as private employers. Application of this Act is controlled by state law. See, *e.g.*, *Williams* v. *United States*, 350 U.S. 857 (1955); *Dornan* v. *United States*, 460 F.2d 425, 427 (9th Cir. 1972); *Guthrie* v. *United States*, 392 F.2d 858, 859 (7th Cir. 1968). But provision of official or duty, as opposed to leave, status surely weighs in favor of coverage. It is only when a person is on non-duty status, such as military travel or leave status, that a question even arises as to coverage under this Act. See, *e.g.*, *Garrett Freightlines, Inc.* v. *United States*, 529 F.2d 26 (9th Cir. 1976); *Bissell* v. *McElligott*, 369 F.2d 115 (8th Cir. 1966), cert. denied, 387 U.S. 917 (1967); *Cooner* v. *United States*, 276 F.2d 220 (4th Cir. 1960).

Congress obviously makes a distinction between "official" or duty status[15] on the one hand and leave status on the other. This distinction should not be blurred when Congress carefully chooses which term to apply to a given

[15] "Official time is unquestionably the equivalent of duty status. The reports regarding the Executive Order programs, for example, equated official time with duty hours as opposed to non-duty hours. See *Legis. Hist.* 1236. While Section 7131(a) bestows official time only "during the time the employee otherwise would be in a duty status,"

activity. For example, Congress treats general witness or jury duty differently than "official duty" court appearances. For the former, Congress has provided a form of excused "leave" so that an employee can perform such duties of citizenship without loss of pay or service credit. 5 U.S.C. (Supp. V) 6322(a). But Congress designated a different status for work-related court functions A government employee is performing "official duty" when summoned or assigned by his agency to testify or produce official records on behalf of the government or to perform the same functions on behalf of a non-governmental party *Id.* 6322(b). This distinction, made in the same statute, is one with a difference because of the attributes of employment that attach to official duty. See generally 38 Comp. Gen. 307, 310 (1958) (employee testifying in his "official capacity" entitled to compensation without regard to application of "court leave" provisions). Significantly, in designating such official duty status, Congress at the same time specified that Section 5702 travel expenses were available for official testimony on behalf of a non-governmental party, in order to overturn a contrary Comptroller General decision. 5 U.S.C. (Supp. V) 5751(b); S. Rep. No. 91-1371, 91st Cong., 2d Sess. 5.

Similarly, Congress has provided "leave" without loss of pay or service credit for reserve and National Guard duty. 5 U.S.C. (Supp. V) 6323. Moreover, agencies may grant "excused leave" for such worthwhile endeavors as blood

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this condition merely places a limit on official time for negotiation. That is, like the former Assistant Secretary regulations allowing travel expenses but no overtime pay, no premium pay is allowed. See 29 C.F.R. 206.7(g) (1974 Compilation). The Eighth Circuit was therefore clearly wrong in concluding that the statute draws a distinction between official time and duty status. *United States Department of Agriculture v. FLRA*, *supra*, 691 F.2d at 1249 n. 16.

donations, voter registration and voting. Federal Personnel Manual, FPM Supp. 990-2, bk 630, subch. S11 (May 23, 1968, rev'd July 1969). But the Bureau is wrong in equating (Br. 33 n. 23) these "public interest" activities, granted without any statutory authority, with activities for which Congress provides statutory "official time." There is a critical distinction between activities the government wishes to encourage by allowing leave without loss of pay and activities for which Congress designates "official time" or duty status. The former obviously carries no other attributes of employment, while the latter by definition means that an official employment relationship exists. As discussed above, when an employee is on official time or status, other attributes of employment attach to the employee's activities.[16]

Finally, the legislative history and purposes of Section 5702 suggest that it would apply to any employee on official time. The Travel Expense Act, of course, deals with "official business" and "official travel." The legislative history of that Act and its 1926 predecessor support the conclusion that travel expenses were intended to apply to anyone on "travel duty," "travel status," "authorized travel" or one traveling on "official duty." See, *e.g.*, S. Rep. No. 81-428, 81st Cong., 1st Sess. 1, 2; *Subsistence Expenses and Mileage Allowances of Civilian Officers and Employees of the Government: Hearings on H.R. 3005 Before the Committee on Expenditures in the Executive*

[16]Indeed, when the President has provided "official time" he has coupled that privilege with travel and per diem rights. See Exec. Order 10529 (civil defense activities), set forth at Federal Personnel Manual, FPM Supp. 990-2, bk. 630, subch. S11-3. This Executive Order provides that "official time" may be authorized for employees participating in recognized civil defense programs, with provision of "travel allowances and expenses." Section 2(b), 3.

Departments, 81st Cong., 1st Sess. 82, 102 (1949); H.R. Rep. 69-888, 69th Cong., 1st Sess. 3, 6, 7. These descriptions obviously apply to an employee engaged in collective bargaining under Section 7131(a). Moreover, the Travel Expense Act was passed in order to eliminate the hardship of employees traveling on the job. The FLRC reports establish that this was the same sort of hardship that "official time" provisions are intended to remedy. *Legis. Hist.* 1265, 1335.

C. Employer Payment of the Travel Expenses of Union Negotiators is Entirely Consistent With the Labor-Relations Scheme in the Federal Sector.

One of the Bureau's primary arguments is that it would be illogical for the government as an employer to pay travel expenses incurred by its "opposition" – *i.e.*, the employee representative. The Bureau emphasizes that, in the private sector, employer payment of union negotiation expenses is not the norm but only an extraordinary remedy for bad faith bargaining (Br. 20-21). See *Florida National Guard v. FLRA, supra,* slip op. 1885 n. 11. This argument, however, completely overlooks the unique ties that exist between the federal government as employer and federal employee unions. The fact is that the union in the federal sector is treated quite differently than its private sector counterpart. The government as employer has chosen to nurture and actually subsidize federal sector unions for cogent policy reasons. The employer payment of employee negotiation expenses is thus wholly consistent with the overall statutory scheme.

As already described, Title VII reflects Congress's studied decision to strengthen and expand the collective bargaining process in the civil service. Congress made this

choice for one predominant reason – because of its conviction that a stronger collective bargaining program would translate into higher productivity, greater efficiency and increased harmony in the performance of government functions. 5 U.S.C. (Supp. V) 7101. See *supra* pp. 17-18. There was certainly some concern for the federal government's unique ethical responsibilities for fair and equitable labor relations. See, *e.g.*, 124 Cong. Rec. 29196, 33389 (1978), *Legis. Hist.* 950, 1039 (statements of Rep. Lott, Sen. Ribicoff); Report of the President's Task Force on Employee-Management Relations in the Federal Sector (1961), *Legis. Hist.* 1195; Federal Personnel Management Project, Option Paper Number Four (1977), *Legis. Hist.* 1363. But the prime motivation behind the collective bargaining program was to provide employees a greater voice and thus achieve greater productivity with a more cooperative and better motivated workforce.

Providing federal employees with the requisite input proved difficult, however, for two reasons. Congress also chose to grant employee organizations a very narrow role, while giving them heavy responsibilities on behalf of all employees. The role of federal employee unions, as compared with that of private sector unions, is extremely circumscribed. Congress unilaterally sets wages for government workers and dictates many other aspects of employment left to negotiation in the private sector. The statutory definition of "collective bargaining" regarding "conditions of employment" excludes, *inter alia,* matters that are "specifically provided for by federal statute." 5 U.S.C. (Supp. V) 7103(a)(12) and (14)(C). Such basic labor issues as pay, pensions, leave, insurance, layoff procedures, and seniority rights are thus completely excluded from the federal bargaining table. In addition, the agency cannot negotiate concerning any "Government-wide rule or

regulation." *Id.* 7117. Moreover, the Civil Service Reform Act reserves specified "management rights" for the complete authority of the government agency rather than for the negotiating table as under the National Labor Relations Act. These management prerogatives include the broad authority to determine the "mission, budget, organization, number of employees, and internal security practices of the agency." *Id.* 7106(a)(1). The government also retains the right to control through legislation such basic practices as hiring, assigning, directing layoff, retention, suspension, removal, reduction in grade or pay, and disciplining of federal employees. *Id.* 7106(a)(2)(A). Employee organizations are given authority to negotiate only over the "procedures which management officials will observe in exercising any authority under this section" and the "appropriate arrangements for employees adversely affected." *Id.* 7106(b)(2) and (3). In addition, of course, federal employees are deprived of the main bargaining chip held by private sector unions. Strikes and work stoppages are strictly prohibited. *Id.* 7116(b)(7). Government employees are therefore left without the normal economic clout to back up their bargaining positions.

While giving federal employee unions only limited bargaining rights, Congress adopted another policy also tending to undermine the union's efficacy. It extended the union's services to non-union members without providing for the financial security of an "agency shop" whereby non-members would pay representational fees. An exclusive representative in the federal sector "act[s] for, and negotiate[s] collective bargaining agreements covering, all employees in the unit." 5 U.S.C. (Supp. V) 7114(a)(1). All employees are therefore entitled to the union's services without having to pay dues or service fees. The union must represent the interests of all employees "without

discrimination and without regard to labor organization membership." *Ibid.* And the union's collective bargaining responsibilities are very specific. Its duty to engage in good faith bargaining includes the statutory duty "to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays." *Id.* 7114(b)(3). The union must, for every negotiation session, provide "duly authorized representatives prepared to discuss and negotiate on any condition of employment." *Id.* 7114(b)(2).

Congress was quite concerned about the added costs of doing business that it was imposing upon federal employee unions. To compensate for giving unions such a limited role while imposing costly duties, Congress considered, but then decided against allowing, an "agency shop" where all employees must pay union dues or representational fees. See, *e.g.*, Supplemental Views to H.R. 11280, *Legis. Hist.* 722. Negotiation of the agency shop is, of course, allowed in the private sector in the majority of states, where there are no right-to-work laws prohibiting the practice. See 29 U.S.C. (Supp. V) 158(a)(3), 164(b). But Congress ultimately prohibited the agency shop for federal employee unions, 5 U.S.C. (Supp. V) 7102, deciding in favor of other types of union security arrangements. See Task Force 6 Report; *Legis. Hist.* 1440-1442. There was hot debate over this decision "to have the taxpayer shoulder the burden of some of the incidental costs associated with maintaining a union." 124 Cong. Rec. 29196 (1978); *Legis. Hist.* 950 (statement of Rep. Lott). But Congress clearly decided in favor of providing unions with benefits and actual subsidization unknown in the private sector.

For example, the government pays for all union dues

collection. When an employee authorizes the agency to deduct periodic union dues, the "allotment shall be made at no cost to the exclusive representative or the employee." 5 U.S.C. (Supp. V) 7115(a). The government also provides "customary and routine services and facilities" to unions. *Id.* 7116(a)(3). Another unprecedented benefit is that the government must remain neutral in union elections. Government officials cannot, like their private employer counterparts, argue against unionization. See 124 Cong. Rec. 29193 (1978); *Legis. Hist.* 945 (statement of Rep. Ford). A most they may encourage employee voting, correct the record regarding false statements, and inform "employees of the Government's policy relating to labor-management relations and representation" – *i.e.*, that unions and collective bargaining are in the public interest. 5 U.S.C. (Supp. V) 7116(e); 124 Cong. Rec. 38716 (1978), *Legis. Hist.* 996 (statement of Rep. Ford). See generally, *Department of the Air Force, Air Force Plant Representative Office, Detachment 27, Fort Worth Texas and NFFE Local 1958 and AFGE Local 1361*, 5 F.L.R.A. No. 62 (Apr. 17, 1981).

Finally, of course, there is the unique "official time" provision itself, under which the government pays for significant amounts of employee time spent in representational activities. 5 U.S.C. (Supp. V) 7131(a) and (d). The very concept of "official time" is peculiar to the public sector, where both union and management negotiators are routinely employed by the same entity. In the private sector, by contrast, union negotiators are most often employed by the union, not the affected company, so that the question of the employer paying for negotiating time for the union would not even arise. Moreover, Congress's decision to *require* agencies to provide official time for any employee representatives stands in stark contrast to

private sector practice. Where employees of the company do negotiate on behalf of their union, the National Labor Relations Act does not require the employer to pay for any such negotiating time. Employers may provide leave — not to be confused with "official time" — but such a practice is a subject for bargaining; it is not required. See *Axelson, Inc. v. NLRB*, 599 F.2d 91 (5th Cir. 1979). Thus, the practice for private employers is analogous at most to the discarded Executive Order program where paid time was merely open to negotiation, not required.

For these reasons, the Bureau's analogy to the private sector is entirely inappropriate. Private businesses do not pay travel expenses for union representatives because there is an entirely different management-union relationship from that in the public sector. By contrast, government payment of travel expenses incurred by employee representatives is wholly consistent with the statutory scheme in the federal sector where the government subsidizes certain costs of union representation, including the major cost of negotiating time. The Civil Service Reform Act strives to nurture and support federal employee unions, in a manner unknown in the private sector, so that labor organizations will be able to provide their limited, but important, services to all federal workers.

D. The FLRA, the Agency Charged With Carrying Out the Purposes of the Civil Service Reform Act, Correctly Interpreted the Official Time Provision in a Manner that Furthers the Goals of the Statute.

There is no question but that Congress left issues of statutory construction to the FLRA's expertise. The Act directs that "[t]he Authority shall provide leadership in establishing policies and guidance relating to matters

under this chapter, and, except as otherwise provided, shall be responsible for carrying out the purpose of this Chapter." 5 U.S.C. (Supp. V) 7105(a)(1). The statute provides for judicial review of Authority decisions under the Administrative Procedure Act, so that its decisions may be overturned only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* 7123(c), 706(a)(A). Accordingly, the court below correctly determined that the Authority's construction of the official time provision should be affirmed if "reasonably defensible" (Pet. App. 5a). See *Department of Defense v. FLRA*, 659 F.2d 1140 (D.C. Cir. 1981), cert. denied, 455 U.S. 945 (1982).[17] The Ninth Circuit correctly determined that "[t]he FLRA, acting in its own area of expertise, has interpreted the relevant language of Title VII in a clearly defensible manner, and we are neither permitted nor inclined to substitute a different judgment" (Pet. App. 11a). See also *United States Department of Agriculture v. FLRA, supra*, 691 F.2d at 1251 (dissent);[18] *Division of Military and Naval Affairs v. FLRA, supra*, 683 F.2d at 49 (dissent).

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[17] In this respect, as in many others, the FLRA is much like the NLRB, whose defensible construction of the NLRA is entitled to considerable deference. See, *e.g.*, *Ford Motor Co. v. NLRB*, 441 U.S. 488, 495 (1979); *NLRB v. Local Union No. 103*, 434 U.S. 335, 350 (1978). While Congress did not intend courts to rubber stamp FLRA decisions, but to ensure reasoned statutory interpretation (124 Cong. Rec 38718 (1978); Legis. Hist. 1000 (statement of Rep. Ford)) the FLRA's construction in this case is clearly sound.

[18] As Judge Heaney correctly pointed out in his dissent (691 F.2d at 1252 n. 2), the FLRA's interpretation is not owed less deference because it refers to the Travel Expense Act. The Authority was construing Congress's intent under the later-enacted Civil Service Reform Act. "[T]he core of the FLRA's analysis was based on its interpretation of federal labor relations policy, a matter within its specified authority and deserving of obvious deference." *Ibid.*

The specific question whether "official time" includes travel expenses is precisely the type of question best left to the FLRA's discretion. Normally, the Comptroller General has final authority to authorize expenditure of public funds for such things as travel expenses. But Congress expressly decided to deny him a voice in Civil Service Reform Act matters, choosing instead to vest the FLRA with full responsibility for spending authorization. As Representative Ford remarked, "[w]e have precluded the intrusion of nonlabor relations entities, such as the Comptroller General, into the bargaining and dispute resolution process at both the agency and Authority levels." 124 Cong. Rec. 38718; *Legis. Hist.* 1000. Even when the Comptroller General had a role in regulating travel expenses of employee representatives under the Old Executive Order schemes, however, he deferred to the expertise of the entity then in charge of labor-management issues. Thus, the Comptroller General informed the Chairman of the Civil Service Commission that the Comptroller's office would bow to CSC guidelines establishing "necessary standards for a reasonable and uniform exercise of the discretionary administrative authority you consider essential to the fulfillment of the objective of employee-management cooperation as contemplated by Executive Order No. 10988." 46 Comp. Gen., *supra*, at 22. Similarly, the Comptroller General now declines to issue decisions on any matter "more properly within the jurisdiction of the Federal Labor Relations Authority...." 4 C.F.R. 22.8. See, *e.g.*, *American Federation of Government Employees, Local 2459*, B-210565 (Mar. 25, 1983); *Gerald M. Hegarty*, 60 Comp. Gen. 578, 580 (1981). Thus, it is clear that the FLRA's rulings regarding expenditures under the Act control. And the Authority's decision regarding travel expenses is entirely sound and in full accord with applicable principles.

First of all, for the reasons discussed above in detail, the FLRA's interpretation gives proper significance to Congress's rejection of past practices under the old Executive Order program. Moreover, the Civil Service Reform Act is unquestionably remedial legislation that is to be broadly construed to effectuate the statutory purposes. See, *e.g.*, *Peyton v. Rowe*, 391 U.S. 54, 65 (1968); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). See also 124 Cong. Rec. 38718 (1978); *Legis. Hist.* 1000 (statement of Rep. Ford). The FLRA's decision furthers the important statutory purposes of encouraging collective bargaining and correcting inequalities that greatly favored management under the Executive Order. The decision also interprets the statute "in a manner consistent with the requirement of an effective and efficient Government," as specified by 5 U.S.C. (Supp. V) 7101(b).

Congress rejected the collective bargaining scheme under the Executive Order as being too "management-oriented." 124 Cong. Rec. 25613, 25710, 25721 (1978); *Legis. Hist.* 844, 849, 854 (statements of Rep.'s Clay and Ford). As discussed above, Congress wanted to strengthen the union's position as much as possible within the limited areas allowed to it. While depriving the federal employee union of much collective bargaining jurisdiction allowed to labor organizations in the private sector, Congress also granted certain advantages. 124 Cong. Rec. 29196 (1978); *Legis. Hist.* 951 (statement of Rep. Ford). The bill in general was intended to "put Federal workers [sic] unions on equal footing with management in labor disputes during contract negotiations and during consultations." 123 Cong. Rec. 8524 (1977); *Legis. Hist.* 1005 (statement of Sen. Inouye). As to official time in particular, unions were to "be allowed official time to carry out their statutory representational activities *just as management uses official*

time to carry out its responsibilities." 124 Cong. Rec. 29188 (1978); *Legis. Hist.* 934 (statement of Rep. Clay; emphasis added).

Interpreting official time as including the right to travel expenses, just as it does for management, thus comports with Congressional intent. See Pet. App. 44a., Such an interpretation puts the union on more equal footing with management, which may choose at will to travel for negotiations. See *id.* at 10a. Similarly, as the Authority reasoned, its interpretation "also facilitate[s] more effective union representation at the bargaining table, thereby implementing the purpose of the statute . . ." (Pet. App. 44a). In advocating removal of the old prohibition against official time, the FLRC had stated in its 1971 Report that such inequality between labor and management had "some unfavorable effects on the negotiation process; for example, difficulties in scheduling negotiation sessions, and delays in completing negotiations because of a union's inability to provide representation." *Legis. Hist.* 1265. Provision of travel expenses for management, but not labor, negotiators can obviously have the same adverse consequences, albeit to a lesser degree. Thus, the FLRA's construction of the official time provision as including travel expenses will promote effective collective bargaining.

The court below correctly rejected the Bureau's contention that availability of travel expenses would adversely affect collective bargaining by impairing the willingness of union negotiators to reach an agreement. We fail to understand how the mere provision of travel expenses, where official time is unquestionably allowed, would lead a union to drag its feet. In any event, as the court below pointed out, the statute provides a check against such conduct. The Act mandates good faith negotiations and pro-

vides recourse to the Federal Service Impasses Panel (Pet. App. 11a). As the court below reasoned, the FLRA's interpretation "yields no more advantage to labor negotiators than that formerly possessed by management negotiators," who were surely not corrupted by their entitlement to expenses.

Neither of the statutory construction principles upon which the Bureau relies (Br. 25-27) is applicable. First of all, this is simply not a sovereign immunity situation. The government has clearly subjected itself to unfair labor practice proceedings, whereby the FLRA determines what agency expenditures are required by the statute. The Bureau also apparently argues that every statute authorizing public expenditures should be strictly construed. The cases cited, however, merely stand for the unchallenged proposition that expenditure of public funds is proper only when actually authorized by Congress. See *United States v. MacCollom*, 426 U.S. 317, 321 (1976) (plurality opinion); *United States v. Zazove*, 334 U.S. 602 (1948); *Pine Hill Coal Co. v. United States*, 259 U.S. 191, 196 (1922). We certainly agree that government liability for expenditures should not be superimposed on statutes where it does not exist. The question here, however, is simply one of statutory construction. Our position is that the FLRA correctly divined Congressional intent in providing official time.

Moreover, the Bureau expresses unreasonable fears (Br. 23 n. 16) over management's lack of budgetary control. The statute imposes significant limits on official time and, concommitantly, on travel expenses. Such privileges are available only "during the time the employee otherwise would be in a duty status" – *i.e.*, no overtime is authorized. Section 7131(a). The provision also specifies that

"[t]he number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes." *Ibid.* Of course, in this case, management had four representatives and the union only one – a not uncommon situation. But, in any event, the agency can control costs by keeping down its own number of representatives, thus limiting employee representative costs.

In addition, subsequent FLRA decision have further limited availability of official time and expenses. A union representative must be part of the relevant bargaining unit to receive official time, and official time need not be authorized for negotiation of a local supplement to a national master agreement. *Air Force Logistics Command, Wright-Patterson AFB, Ohio and Wright-Patterson AFB Fire Fighters,* 7 F.L.R.A. No. 118 (Jan. 22, 1982); *Interpretation and Guidance,* 7 F.L.R.A. No. 105 (Jan. 15, 1982). We also note that agency supervisors have the authority to ensure that expenses of union representatives are necessary and reasonable. See FPMR 101-7, Bulletin FPMR A-40, Supp. 1, Ch. 101.4 (Sept. 28, 1981). Whatever standards exist for authorizing travel for management representatives will equally apply to union representatives.[19] There is certainly no danger that union representatives will incur extravagant expenses.

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[19]The Bureau objects (Br. 23) to the FLRA's decision in *Dept. of the Air Force, Air Force Logistics Command and AFGE, Council 214,* 10 F.L.R.A. No. 53 (Sept. 30, 1982). The Authority there held that departments could not require justification from unions for selection of out-of-town negotiators. But, as the FLRA reasoned, the union does have a clear statutory prerogative to designate its own representatives. These employee representatives are already unquestionably entitled to official time; they are, however, subject to the limitations discussed above.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

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ADDENDUM

U.S. DEPARTMENT OF LABOR
Bureau of Employees' Compensation
Washington, D.C. 20211

FECA PROGRAM MEMORANDUM NO. 39

SUBJECT: SECTION 1(a), FECA - FEDERAL UNION OFFICIALS

Executive Order 10988 establishes the basis for employee-management cooperation in personnel and related matters within the Federal Service. In the case of any employee organization which has been formally recognized by a Federal agency or has been recognized as the exclusive representative of agency employees the Order requires that the employee organization be given the opportunity to be represented at negotiations and/or discussions between management and employees or employee representatives for the formulation and implementation of personnel policies.

The Bureau has determined that a Federal employee will be in the performance of duty for the purposes of the FECA while he travels to or from or while he attends a negotiating session as a representative of a union provided (1) the negotiating session is one held pursuant to an agreement between the union and the agency officials as provided in Executive Order 10988, and (2) at the time of the injury he was doing something which is a necessary or reasonable incident of the travel or the meeting.

/s/

John J. Newman
Assistant Director – FECA

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No. 82-799

In the Supreme Court of the United States

OCTOBER TERM, 1983

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
PETITIONER

v.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In our opening brief we stressed that neither the language nor the history of Title VII of the Civil Service Reform Act of 1978, 5 U.S.C. 7101 *et seq.*, mentions payment by federal agencies of travel expenses and per diem of employee union representatives engaged in negotiation of a collective bargaining agreement. Respondents do not dispute this key point. See, *e.g.*, FLRA Br. 9, 30. Rather, they offer a variety of reasons why Congress might have wished to require federal agencies to underwrite union travel expenses and per diem and suggest that various difficulties will arise if agencies do not do so.

It is important to recall that the single issue in this case is not whether union negotiators should receive travel expenses and per diem, but whether such expenses should be funded from union dues or from the pockets of federal taxpayers. As we showed in our opening brief, Congress's failure to provide for agency payment of such expenses (especially when viewed in the light of preexisting practice in both the federal sector and the private sector, see Pet. Br. 5-7, 19-21) indicates that it intended that union dues, rather than federal funds, be used for this purpose. That conclusion is in no way inconsistent with the general scheme of federal labor relations Congress established in Title VII. Congress expressly authorized the collection of union dues (see 5 U.S.C. 7115), and travel expenses and per diem of union negotiators presumably are precisely the sorts of expenses that union dues were meant to cover. Use of union dues for this purpose has no unusual or far-reaching consequences; contrary to respondents' suggestions, the mechanics of collective bargaining and the status of federal employee unions are not undermined by use of union dues (as opposed to a federal subsidy) to pay such expenses.

Respondents and amici offer various reasons why Congress might have wished to require federal agencies to underwrite union travel expenses and per diem. See, *e.g.*, FLRA Br. 35-36; NTEU Br. 29-34; AFGE Br. 25-30; NFFE Br. 24-40. But the fact remains that Congress did not include any such requirement in the statute. Although federal employee unions were successful in persuading Congress to enact certain changes in the federal labor relations program, they did not obtain a provision for federal subsidy of union travel expenses and per diem. In effect,

respondents now are attempting to convince this Court to grant "something that [they were] unable to obtain statutorily from Congress." *United States* v. *New Mexico*, 455 U.S. 720, 744 (1982). But "it is not [the Court's] function to engraft on a statute additions which [it] think[s] the legislature logically might or should have made." *United States* v. *Cooper Corp.*, 312 U.S. 600, 605 (1941). See also *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 343 (1982). Respondents' policy arguments therefore are more properly directed to Congress.

We address below in more detail various contentions urged by respondents. None of these contentions is sufficient to justify the conclusion that Title VII implicitly requires federal agencies, rather than the unions themselves, to underwrite the expenses of union negotiators.

1. Respondents contend that the Authority's order in this case is justified because Congress significantly altered the federal labor relations scheme when it enacted Title VII in 1978. See FLRA Br. 27-32, 36-39; NTEU Br. 16-22. In respondents' view, the fact that Congress made certain changes in that scheme must mean that it also intended to do away with the preexisting policy (see Pet. Br. 5-7) under which federal agencies normally did not subsidize union travel expenses and per diem. In particular, respondents points to Congress's provision for authorization of "official time" for employee union representatives engaged in collective bargaining during the time they otherwise would be in a duty status (5 U.S.C. 7131(a)), its provision for various other benefits to federal employee unions (see, *e.g.*, 5 U.S.C. 7114(b)(4), 7115(a)), and its declaration that federal sector collective bargaining is in the public interest (5 U.S.C. 7101(a)).

The various changes respondents cite do not support their contention; rather, they simply highlight Congress's silence with respect to union travel expenses and per diem. As we pointed out in our opening brief (at 19-20), Congress did not make a complete break with the old executive order program when it enacted Title VII in 1978. Instead, it struck a careful balance between increasing the role of collective bargaining and federal employee unions, on the one hand, and preserving the ability of federal managers to conduct government business in an effective and efficient manner, on the other. The changes Congress chose to make, such as provision for the authorization of official time for employee union representatives engaged in collective bargaining, were discussed in the legislative history and were articulated in the statute itself.[1] In contrast, Congress made no mention of union travel expenses and per diem, despite the fact that it clearly was aware of the need to state its intentions with respect to pay-

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[1] See our opening brief at 19. Respondent FLRA notes (Br. 39 & n.36) that the Comptroller General has stated that his decisions regarding official time under the executive order program have been superseded to the extent they conflict with 5 U.S.C. 7131. Since Title VII nowhere mentions union travel expenses or per diem, there can be no conflict with the Comptroller General's earlier rulings that agency payment of such expenses generally was not authorized. Moreover, even if the earlier rulings were technically superseded, their reasoning tends to undermine the Authority's interpretation of Title VII. See our opening brief at 32-33. Finally, Congress presumably was aware of the Comptroller General's rulings, but expressed no intent to change the practice with respect to travel expenses and per diem. Thus, even if the Comptroller General now has withdrawn those decisions, Congress appears to have codified the rule expressed therein.

ment of travel expenses. As respondent NTEU notes (Br. 22-23), Congress expressly provided in Title VII that members of the Federal Service Impasses Panel would receive reimbursement for travel expenses. 5 U.S.C. 7119(c)(4); see H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 54 (1978). In view of Congress's explicit provision for authorization of official time for employee union representatives and for travel expenses for FSIP members, it would be inappropriate to impute a legislative intent to make a change with respect to union travel expenses and per diem—a subject Congress did not even mention. See *Lehman* v. *Nakshian*, 453 U.S. 156, 162 (1981).[2]

Congress's declaration that federal sector collective bargaining is in the public interest does not imply that Congress intended agencies to make particular expenditures in support of federal employee unions. As we noted in our opening brief (at 37 n.25), the congressional declaration did not represent any dramatic change in the prevailing policy toward federal

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[2] Respondent NTEU implies (Br. 29) that under the executive order program the travel expenses at issue here would have been paid by the agency under rulings of the Comptroller General that permitted payment for union travel when the agency chose a meeting site for reasons of its own economy and convenience. The record in this case shows that both the union representative and the agency representatives wished to view the new office facility in Sacramento (Keehan deposition of Mar. 7, 1980, at 11; Pet. App. 2a). Thus, the travel cannot be characterized as solely for the convenience of the agency. In any event, the Authority's order here was based on its earlier Interpretation and Guidance (Pet. App. 35a-47a), which set a general policy. The Authority did not require payment of the union representative's travel expenses based on the individual facts of this case and application of rulings of the Comptroller General. Thus, NTEU's point is irrelevant.

sector collective bargaining.[8] Moreover, Congress's provision for collection of union dues (see 5 U.S.C. 7115) suggests just the opposite conclusion—that Congress anticipated that unions would pay their own expenses unless the statute specifically provides otherwise.

Contrary to respondents' suggestions (FLRA Br. 33-35; NTEU Br. 34), the declaration that federal sector collective bargaining is in the public interest and the steps Congress took to encourage it do not mean that private sector practices are irrelevant to the question of Congress's intent with respect to union travel expenses and per diem in the federal sector. As we noted in our opening brief (at 20), payment by the employer of union travel expenses and per diem is not required by statute in the private sector; to the extent employers make such payments, they do so on the basis of negotiated agreements. See, *e.g.*, *Midstate Telephone Co.* v. *NLRB*, 706 F.2d 401, 404-407 (2d Cir. 1983). Our point is that, had Congress intended to deviate from both preexisting federal sector practice *and* private sector practice by making such payments a matter of statutory right, it surely would have referred to this intent at some point in its consideration of Title VII.

2. Respondents also contend (FLRA Br. 25-32, 42-45; NTEU Br. 16-29) that the statutory provision for authorization of official time for employee union

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[8] Executive Order 11491 had made it clear, although in different words, that employee participation in the formulation of personnel practices and policies contributed to the efficient administration of government. The preamble to the executive order stated that such participation should be improved through maintenance of a cooperative relationship between labor organizations and management officials. Exec. Order No. 11491, 3 C.F.R. 861 (1966-1970 Compilations).

representatives engaged in collective bargaining and Congress's declaration that such bargaining is in the public interest require that employee union representatives be considered "on the job" during the time they are engaged in bargaining. Since federal employees receive travel expenses and per diem in connection with job-related travel, respondents conclude that employee union representatives also should receive such payments in connection with travel for the purpose of collective bargaining.

The difficulty with respondents' position is that Congress has not said that employee union representatives are to be treated as if they were on the job during negotiation of a collective bargaining agreement. Instead, Congress provided that employee union representatives "shall be authorized official time" for the purposes of collective bargaining "during the time the employee *otherwise* would be in a duty status." 5 U.S.C. 7131(a) (emphasis added). If Congress had meant for collective bargaining on behalf of a union to be regarded as performance of normal job duties for all purposes, it could have said that employee union representatives are on duty status during negotiations. Instead, Congress chose much narrower language that in fact suggests that it viewed collective bargaining on behalf of a union as distinct from duty status.[4]

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[4] Authorization of official time for purposes of negotiation of a collective bargaining agreement simply does not transform such negotiations into the equivalent of duty status. Employees bargaining on behalf of their union do not act for the agency, and they are not supervised by the agency or rated on the quality of their performance.

The fact that Congress has found the process of federal sector collective bargaining to be in the public interest does not mean that union negotiators and agency negotiators no

Moreover, Congress's very choice of the term "official time" shows that respondents' contention is wide of the mark. That term is one that had acquired a particular meaning in the federal labor relations program. A grant of official time had been interpreted to include payment of an employee's salary, but not entitlement to payment of travel expenses and per diem. See Pet. Br. 6-7; Federal Labor Relations Council, *Report and Recommendations on the Amendment of Executive Order 11491, reprinted in* Subcomm. on Postal Personnel and Modernization of the House Comm. on Post Office and Civil Service, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, at 1264 (Comm. Print No. 96-7, 1979) (stating in discussion of official time that "[o]vertime, premium pay, or travel expenditures are not authorized"). Rather than supporting respondents' contention, Congress's reference to authorization of official time indicates that Congress did *not* intend a federal subsidy for union travel expenses and per diem.

Respondent NTEU (Br. 26-27) cites the fact that when a government employee is assigned to appear in judicial proceedings in his "official capacity," he is entitled to travel expenses (see 5 U.S.C. 5751) and that such an employee is considered to be performing "official duty," in contrast to the "leave" status of an

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longer represent different interests when they sit down at the bargaining table. In the public sector, as in the private sector, the point of collective bargaining is the amicable resolution of conflicting viewpoints. See 5 U.S.C. 7101(a)(1)(C); *Allied Chemical Workers Local Union No. 1* v. *Pittsburgh Plate Glass Co.*, 404 U.S. 157, 187 (1971). Thus, even under Title VII, employee union representatives cannot be said to be acting on behalf of the agency when they engage in collective bargaining.

employee who serves as a juror or witness in an unofficial role. See 5 U.S.C. 6322. NTEU finds the similarity between the terms "official duty" and "official time" to be significant. However, the terms are not identical, and an employee appearing in court on behalf of his agency is obviously in a different position from an employee bargaining on behalf of his union. Congress did not use the term "official duty" in Title VII; rather, it chose to refer to "official time"—a term that (as noted above) previously had been interpreted not to include entitlement to payment for travel expenses and per diem of employee union representatives.[5] Moreover, Congress's express provision

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[5] Respondent NTEU and amicus curiae American Federation of Government Employees also find it significant that Congress provided for authorization of official time, rather than leave status, for employee union representatives engaged in collective bargaining. See NTEU Br. 24-29; AFGE Br. 19-21. But Congress presumably chose official time because it was a term of art that had acquired a certain meaning in the federal labor relations program. Furthermore, leave normally is earned by an employee (rather than being an incident of the employee's position), and approval of a supervisor generally is required before an employee may take leave. Thus, Congress may have believed leave status would be inappropriate in the collective bargaining context.

Respondents point to other contexts in which employee union representatives engaged in collective bargaining may be treated as if they were on the job, including receipt of benefits under the Federal Employees' Compensation Act, 5 U.S.C. 8101 *et seq.*, and (perhaps) government liability under the Federal Tort Claims Act, 28 U.S.C. 1346(b). See FLRA Br. 26-27; NTEU Br. 25-26. But the examples indicate only that those particular statutory schemes may be construed as broad enough to encompass injuries or torts that occur in the course of collective bargaining sessions. They do not suggest that Congress intended that employee union representatives be treated for all purposes as if they were on the job.

for travel expenses of witnesses in 5 U.S.C. 5751 again highlights Congress's failure to mention such expenses of employee union representatives in Title VII.

Respondent FLRA also suggests (Br. 43) that payment by agencies of union travel expenses and per diem is proper because 5 U.S.C. 5702 has been read broadly to allow reimbursement in connection with activities such as attendance at conferences sponsored by private organizations. But such attendance presumably is for agency purposes and has been approved by agency supervisors; thus, it can be regarded as job-related. In contrast, an employee union representative acts for the collective bargaining unit and his union, not his agency, when he is engaged in collective bargaining.[6] Again, Congress's choice of

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[6] Respondent FLRA (Br. 42, 43) cites a decision of the Comptroller General, 44 Comp. Gen. 188 (1964), for the proposition that travel expenses may be paid when the purpose of the travel is "sufficiently in the interest of the United States" (*id.* at 189). But the employee in the cited decision was traveling to testify in a criminal proceeding concerning an automobile accident in which another federal employee had been involved. Although the employee was not summoned to testify on behalf of the United States, the outcome of the hearing could have determined the government's liability to a third party under the Federal Tort Claims Act. The Comptroller General therefore concluded that the employee's appearance as a witness would be to the government's advantage and could be considered "official business." The government's interest there was similar to its interest in having an employee appear as a witness on behalf of the United States, unlike the situation here, in which the employee was acting on behalf of his union.

Amicus curiae American Federation of Government Employees cites *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, No. 81-896 (Feb. 23, 1983), for the proposition that

words—"official time," rather than the term "official business" that appears in Section 5702—indicates that it did not intend to require the payments at issue here.

3. Respondents contend (FLRA Br. 19-25; NTEU Br. 34-36) that the Court should apply a deferential standard of review in considering the Authority's statutory interpretation.[7] Respondent FLRA disputes our suggestion (Pet. Br. 29) that deference is

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unions engage in the "official business" of the government. See AFGE Br. 16-17. However, *Perry Education Ass'n* did not raise the question whether a public agency was required to expend public funds to cover union expenses; rather, the issue before the Court was whether a school district that granted access to its interschool mail system and teacher mailboxes to the teachers' exclusive bargaining representative was constitutionally required to grant similar access to rival unions. The Court's remarks were made in the course of explaining why such differential access was reasonable, and the Court appropriately referred to the responsibilities of an exclusive bargaining representative in that connection. In fact, it is not entirely clear what the Court intended to signify by its references to "official business"; in at least one instance, the Court appears to have been referring to the business of the union, rather than the business of the school district employer. See slip op. 13-14 n.10. Of course, *Perry Education Ass'n* does not address the meaning of the term "official business" as it is used in 5 U.S.C. 5702.

[7] Respondent FLRA suggests (Br. 21) that the timing of our challenge to its policy on payment of travel expenses and per diem somehow changes the applicable standard of review. That suggestion is without merit. Whether BATF challenged the policy following issuance of the Authority's initial Interpretation and Guidance or (as here) following application of the policy to BATF, the issue before the Court would be the same—whether the Authority correctly interpreted the statute. No greater deference is due simply because the Authority now has applied its policy to a particular agency.

not due because its interpretation is based in large part on a reading of 5 U.S.C. 5702—a statute the Authority does not administer. FLRA contends (Br. 23-25) that it did not rely heavily on its interpretation of Section 5702, but instead interpreted primarily Title VII. However, a reading of the Authority's Interpretation and Guidance (Pet. App. 35a-47a), which served as the basis for the ruling below, shows that the Authority's use of 5 U.S.C. 5702 was more than incidental. The Authority equated "official time" (the term used in 5 U.S.C. 7131) with "official business" (the term used in 5 U.S.C. 5702) and concluded that the terms were equivalent for the purpose of entitlement to per diem and travel money. See Pet. App. 42a-43a. The reference to Section 5702 was necessary to the Authority's ruling because nothing in Title VII suggests that Congress has required federal agencies to pay union travel bills and per diem.

Respondents urge (FLRA Br. 20 n.15; NTEU Br. 35 n.17) that the proper standard of review is that applicable to statutory interpretations by the National Labor Relations Board.[8] But the Authority's ruling here (unlike rulings of the NLRB) requires the federal government to pay out money. Thus,

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[8] Respondent FLRA seems to suggest (Br. 19-20) that its order should be reviewed under the standard applied to regulations promulgated pursuant to an express delegation of legislative authority. The Authority did not purport to act under such a delegation. 44 Fed. Reg. 42778, 76581 (1979). Moreover, it is clear that Congress did not delegate to the FLRA authority to impose requirements not encompassed by Title VII. Contrast, *e.g.*, *Batterton* v. *Francis*, 432 U.S. 416, 425-426 (1977) (Congress expressly gave agency the authority to prescribe standards for determining what constitutes "unemployment").

principles of sovereign immunity are relevant, and strict construction, rather than deference, is appropriate. As this Court noted recently, "care must be taken not to 'enlarge' [a] waiver of immunity beyond what a fair reading of the language of the [statute] requires." *Ruckelshaus* v. *Sierra Club*, No. 82-242 (July 1, 1983), slip op. 5.[9] Because neither the language nor the legislative history of Title VII expresses an intent by Congress to alter the prevailing policy under which agencies generally did not pay union travel expenses and per diem, a requirement that agencies make such payments may not be read into the statute.[10]

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[9] Respondent FLRA suggests (Br. 40 n.37) that the principle of strict construction of waivers of sovereign immunity applies only in determining whether Congress has consented to a suit against the government. But in *Ruckelshaus* v. *Sierra Club*, *supra*, the question was not whether the government could be sued, but whether, under the provisions of the Clean Air Act, the government could be ordered to pay attorney's fees even though it had prevailed in litigation. The Court did not hesitate to apply the principle of strict construction of waivers of sovereign immunity in concluding that no fee could be awarded because there was no clear showing that Congress intended to change the usual rule that attorney's fees are not awarded against the prevailing party (slip op. 13).

[10] As we noted in our opening brief (at 25-27), our reading of Title VII is reinforced by the principle that a statute should not be interpreted in a manner that would increase the monetary liability of the United States in the absence of clear evidence that Congress intended such a result. See, *e.g.*, *United States* v. *Zazove*, 334 U.S. 602 (1948). Nothing in the cases we cited supports respondent FLRA's contention (Br. 40-41) that this principle of statutory construction applies only to cases dealing exclusively with financial matters.

We note for the record that the Authority has reversed its decision in a case cited at page 25 note 17 of our opening

CONCLUSION

For the foregoing reasons, and the reasons discussed in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

SEPTEMBER 1983

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brief. In *United States Naval Space Surveillance Systems* and *Local 2096*, 9 F.L.R.A. No. 30 (June 23, 1982), on reconsideration (August 31, 1983), the Authority concluded that an agency has no obligation under 5 U.S.C. 7131(d) to negotiate concerning authorization of official time for one of its employees to represent the union in a different collective bargaining unit engaged in collective bargaining with a different agency.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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AMICUS CURIAE BRIEF OF THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, IN SUPPORT OF RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-799

BUREAU OF ALCOHOL, TOBACCO, AND FIREARMS,
Petitioner

v.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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AMICUS CURIAE BRIEF OF THE AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, IN SUPPORT OF RESPONDENTS

PRELIMINARY STATEMENT

Pursuant to Supreme Court Rule 36.2, written consent of the parties having been obtained and filed along with this brief, the American Federation of Government Employees, AFL-CIO (AFGE) files this brief as amicus curiae in support of the Federal Labor Relations Authority (FLRA) and in opposition to the position of the Bureau of Alcohol, Tobacco, and Firearms (BATF).

INTEREST OF THE AMICUS CURIAE

AFGE is a labor organization affiliated with the AFL-CIO. AFGE is the largest federal sector union representing more than 700,000 employees of the federal government. AFGE is obligated by 5 U.S.C. § 7101 *et seq.* to

fairly negotiate and administer collective bargaining agreements covering its bargaining unit members—including nationwide, master agreements in the Social Security Administration, Veterans Administration, Equal Employment Opportunity Commission, etc. AFGE files this brief because this Court's ruling will have a direct effect on its employee representatives' entitlement to travel and per diem expenses while participating in the negotiation of collective bargaining agreements pursuant to 5 U.S.C. §§ 7114 and 7131.

AFGE is already a party in a case involving the identical issue pending before this Court on petition for writ of certiorari involving the Eight Circuit's decision in *U.S. Department of Agriculture v. FLRA*, 691 F.2d 1242, petition for cert. pending No. 82-979. AFGE was also granted amicus curiae status and filed briefs in the following cases involving the exact issue now before this Court: *Div. of Military & Naval Affairs v. FLRA*, 683 F.2d 45, petition for cert. (from the Second Circuit) pending No. 82-1021; *Florida National Guard v. FLRA*, No. 81-5466 (11th Cir., March 7, 1983). AFGE is also a party in an action on this same issue pending in the D.C. Circuit and stayed until this Court issues its decision in the instant case, *Bureau of the Mint v. FLRA and AFGE*, No. 82-1194.

In view of the above, it is clear that AFGE has a direct and compelling interest in the outcome of this litigation.

SUMMARY OF ARGUMENT

1. Amicus AFGE contends that the FLRA's decision below must be affirmed under the standard for judicial review of FLRA decisions set forth at 5 U.S.C. § 7123(c). Under § 7123(c), FLRA decisions shall only be set aside if found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. Further, under the past decisions of several Circuits, FLRA decisions are entitled to great deference and should not be set

aside if "reasonably defensible." *E.g., DOD v. FLRA, infra.*

AFGE maintains that where, as here, there is disagreement over the interpretation and scope of terms of art employed in § 7131 of the FLRA's statute, the FLRA acts reasonably under 5 U.S.C. § 7105(a)(1) and (a)(2)(I) in choosing the interpretation it believes best effectuates the purposes of the legislation absent clear evidence of contrary Congressional intent. In the instant case, petitioner has not put forward any such evidence.

Four Circuits have decided this issue: The Second, Eighth, Ninth, and Eleventh. The Ninth Circuit, in the decision currently under review, unanimously upheld the FLRA's ruling that the statute's grant of official time for negotiations includes necessary travel and per diem payments. The Ninth Circuit, quoting from a number of D.C. Circuit decisions, found the FLRA's decision reasonably defensible and entitled to deference. The Second and Eighth Circuits (over vehement dissents in each) and a unanimous Eleventh Circuit panel found that the FLRA decision was not entitled to deference because it depended upon another statute, 5 U.S.C. § 5702. In this regard, we show that application of § 5702 was simply a ministerial matter, and the Second, Eighth and Eleventh Circuits were clearly wrong in determining that the FLRA was not interpreting its own Statute and were wrong, therefore, in not according the FLRA decision due deference.

2. In light of the context of the Reform Act, and the clear pronouncements contained in 5 U.S.C. §§ 7101, 7114, and 7131, the FLRA did not err in concluding that negotiators in the Federal sector are engaged and participating in the official business of the government. Federal sector negotiations are unique in that only subjects of *mutually* beneficial interest are generally negotiable, such as: affirmative action/equal employment opportunity health and safety, grievance dispute resolution, fair and

equitable personnel actions, merit promotion, reprisal free work environment, etc. It is significant that most traditional "partisan" private sector subjects of bargaining are generally *not* negotiable, such as: seniority, performance standards, pay, retirement, fringe benefits, right to strike, union security, etc. Thus, the FLRA's opinion is clearly reasonable and in full accord with the Supreme Court's recent findings in *Perry Education Association*, 103 S.Ct. 948 (1983), wherein the Court found a public sector union to be engaged in the official business of the government employer.

3. AFGE's Brief also traces the history of this issue and establishes that the FLRA is not exercising any more authority in this area than the now defunct Civil Service Commission exercised under an Executive Order. *See* FPM Letter 711-5 August 1, 1966. Based on Executive Order 10988, the CSC found that the Government could provide travel and per diem to union negotiators where such payments were in the Government's interest. Here, the FLRA emphasized that Congress has expressly declared at 5 U.S.C. § 7101 that collective bargaining is in fact in the public's interest. Moreover, the FLRA reasoned, negotiators on both sides who are actually on *duty time* under § 7131(a) should be treated equally, are not in a "paid leave" status, and so should be entitled to payment of their on duty official travel and per diem expenses.

4. The BATF's main argument—that the FLRA's decision will lead to great expense—is easily dismissed when viewed in actual operation out in the real world. Thus, in view of all the circumstances involved, there is no evidence that the FLRA decision will cost any more money. As the FLRA has recognized in the past, under a system where consolidated negotiations at the single highest or national level are in the public interest and favored, *Veterans Administration*, 1 FLRA No. 55 (1979), p. 35, it is

necessary that the union's local representatives from all over the country appear. However, the centralized operations of the government allow it in most agencies to have all its negotiators located at one location already (such as VA's central office in Washington, SSA's in Baltimore, and Justice's in Washington.) Thus, if travel and per diem for union negotiators were not authorized, the union—having to bear the entire travel burden—would be fully within its rights to insist, for example, that VA negotiations be held in a geographically centralized location equally burdensome to both sides, such as Kansas City or Chicago. Thus, practically speaking, the VA would be required to spend just as much or more money sending all its management people and resources from Washington to Chicago as it would in bringing just the union negotiators to Washington. In view of the above, common sense alone dictates that the FLRA was not "clearly in error" in determining, based upon its unique experience, that travel and per diem expenses were consistent with the purposes of the Statute when the realities of the situation were fully considered. The FLRA also appropriately determined that "the payment of travel and per diem expenses would not only more nearly equate the status of union and management negotiators as contemplated by Congress but would also facilitate more effective union representation at the bargaining table, thereby implementing the purpose of the Statute, as reflected in Section 7101(a), to encourage collective bargaining in the Federal sector." *Interpretation and Guidance, infra.*

ARGUMENT

A. THE FLRA'S DECISION SHOULD BE AFFIRMED BECAUSE IT WAS NOT ARBITRARY, CAPRICIOUS, AN ABUSE OF DISCRETION, OR OTHERWISE NOT IN ACCORDANCE WITH LAW.

The CSRA provides that judicial review of FLRA decisions "shall be on the record in accordance with section 706 [of Title V]." 5 U.S.C. § 7123(c). Section 706, in turn, declares that agency action shall only be set aside if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A). This section has been interpreted on numerous occasions as requiring the court to give great deference to an interpretation of a statute by the agency entrusted with its administration. *See, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1970); *U.S. v. City of Chicago*, 500 U.S. 8, 10 (1970); *Udall v. Tallman*, 380 U.S. 1, 4 (1965).

"Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *Power Reactor Development Co. v. Int'l. Union of Elec., Radio & Machine Workers*, 367 U.S. 396, 408 (1961) *quoting Norwegian Nitrogen Products Co. v. U.S.*, 288 U.S. 294, 315 (1933), in turn *quoted in NFFE v. FLRA*, 652 F.2d 191 (D.C. Cir. 1981); and *Dept. of Defense, Army-Air Force Exchange Services, Ft. Dix, N.J. v. FLRA*, 659 F.2d 1140 (D.C. Cir. 1981) *cert. denied sub nom., AFGE v. FLRA*, 102 S.Ct. 1443 (1982).

Thus, in the first cases brought against the FLRA under the CSRA, the judiciary has already clearly declared that the FLRA is entitled to great deferenec in interpreting Title VII of the Reform Act, and its interpretation of the Statute should be affirmed "unless there are *com-*

pelling indications that it is wrong." [Emphasis added] *Miller v. Youakim*, 440 U.S. 124, 125, n.25 (1979), *quoting Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969), *expressly followed in NFFE v. FLRA*, *supra*, and *DOD v. FLRA*, *supra*.

Significantly, where "the FLRA's construction of the statute is reasonably defensible, [the courts] are not free to reject it merely because we might decide differently if confronted with the question in the first instance." *See DOD v. FLRA*, *supra*, at n.121. This is true because "Congress intended the needed judgments to be made not by this court, but by the Authority." *Id.* at 1161. Particularly in light of the great deference due the FLRA, this Court should uphold its decision where, as here, petitioners' arguments constitute merely a difference in opinion with the FLRA over the meaning and scope of the terms "collective bargaining" and "official time" as employed in Title VII of the Act. As the Court of Appeals, D.C. Circuit, recently ruled in a similar case questioning an Authority interpretation of terms employed in the Reform Act: "The surface ambiguity of the central statutory distinction provides a further reason for us to defer to the considered judgment of the Authority." *DOD v. FLRA*, *Id.* Where, as in the instant case, several differing interpretations of "terms of art" employed in Title VII are available, the FLRA acts reasonably and correctly in choosing the interpretation it believes is most consistent with and best effectuates the overall purposes of the legislation. *EEOC v. Louisville & Nashville R. Co.*, 505 F.2d 610, 616-17 (5th Cir. 1974). It is particularly appropriate for the Court to be guided by the FLRA's understanding of the Congressional purposes underlying the Reform Act. *Power Reactor Development Co.*, *supra*, at 408.

Four Circuit Courts of Appeals have already ruled on the official time, travel and per diem issue now before

this Court. The Ninth Circuit in the case at bar, unanimously upheld the FLRA in *Bureau of Alcohol, Tobacco, and Firearms v. FLRA*, 672 F.2d 732 (1982). In so doing, the Ninth Circuit deferred to the judgment of the FLRA and held that the FLRA's interpretation "should not be rejected simply because a court might prefer another view. . . It is our determination that the Interpretation and Guidance under examination here is reasoned and supportable." *Bureau of Alcohol, Tobacco, and Firearms v. FLRA, supra*, at 735-6.

The Ninth Circuit decision is clearly consistent with the general rules employed by the courts in reviewing FLRA decisions. *Department of Defense v. FLRA, supra*, at 1162 n.121. In contrast, however, the Second and Eighth Circuits, in 2-1 decisions still under review (petitions for certiorari pending), and the Eleventh Circuit refused to defer to the FLRA's judgment. *Division of Military and Naval Affairs v. FLRA*, 683 F.2d 45 (2nd Cir., 1982); *United States Department of Agriculture v. FLRA*, 691 F.2d 1242 (8th Cir., 1982); *Florida National Guard v. FLRA*, No. 81-5466 (11th Cir., March 7, 1983).

In so doing, both panel Majorities, over vehement dissents, ruled that deference was not necessary in these cases because the FLRA was not interpreting its own statute but rather 5 U.S.C. § 5702 governing "official business". Thus freeing themselves of the "shackles" of 5 U.S.C. § 706's limited standard for judicial review, the Majorities and Eleventh Circuit Panel proceeded to reject the Authority's decision, *not* because the FLRA decisions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," but simply because they disagreed with the FLRA's reasoning.

Quite obviously, these decisions, rejecting the clearly set forth 706 standard of review and giving the courts free rein instead, constitute judicial sleight of hand

which should not be countenanced by the Supreme Court which has been steadfast in its view that the courts should defer to the regulatory agencies that Congress has plainly empowered with the authority to set policies and effectively administer their statutes.

The Second and Eighth Circuit Majorities and the Eleventh Circuit Panel did not comport with the generally accepted standards for review set forth at 5 U.S.C. §§ 706 and 7123 when they expressly ruled that they need not defer to *Interpretation and Guidance*, 2 FLRA No. 31 (1979). Rather, they quite wrongly assumed that the FLRA's brief reference therein to 5 U.S.C. § 5701 *et seq.* provided the Courts an escape hatch by which they could somehow exorcise themselves from the normal constraints of judicial deference. However, Second Circuit Judge Oakes made a direct response to this argument in his well-reasoned dissent in *Division of Miltary and Naval Affairs*, *supra* at 49-50, and correctly identified the errors implicit in that court's majority reasoning when he stated:

> This is simply not so. "Interpretation" of "official business" in section 5702(a) is at most secondarily involved. An employee travelling on official business is entitled under that statute to a per diem allowance. The FLRA simply made one brief reference to that statute in interpreting a provision of Title VII, 5 U.S.C. § 7131(a), authorizing "official time" for employees "representing an exclusive representative in the negotiation of a collective bargaining agreement." The FLRA's Interpretation and Guidance, 2 FLRA [No. 31] (1979), was issued pursuant to 5 U.S.C. § 7105(a)(1), requiring the FLRA to "provide leadership in establishing policies and guidance" so as to carry out the purpose of Title VII. It was issued after due notice, 44 Fed. Reg. 42778 (July 20, 1979), and hearing, *id.* at 76581 (Dec. 27, 1979) . . .

> Virtually the entire Interpretation is devoted to the legislative history of Title VII and section 7131. Only a single paragraph in the eight page Interpretation refers to 5 U.S.C. § 5701 *et seq.*[2]
>
> . . . [T]he FLRA's decision is "reasonably defensible" and should be upheld.

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[2] . . . A fair reading of the Interpretation and Guidance is that the FLRA made the determination whether employees on official time are entitled to payments for travel and per diem on the basis of section 7131(a) and Title VII, and then concluded that employees participating in negotiation activities under that section are on "official business" and entitled to the payment of travel and per diem under 5 U.S.C. § 5701 *et seq.*, which simply operates to provide the authorization to expend funds.

As is evident from even a cursory understanding of the workings of 5 U.S.C. § 5702, in reaching its decision the FLRA merely employed 5 U.S.C. § 5702 *ministerially*. In this regard, § 5702 clearly establishes that all federal employees will receive travel expense reimbursement when engaged in necessary travel related to official business. The Comptroller General has ruled that § 5702 rights attach to those functions that are deemed, *in the discretion of the Government*, to be in "the Government's interest." *E.g.*, 52 Comp. Gen. 97, B-140144, August 18, 1972 at p. 99. Prior to the passage of the Reform Act, the authority to determine whether negotiators were entitled to travel and per diem expenses was placed in the now defunct Civil Service Commission (CSC). *See*, § 25 of E.O. 11491. The Commission, having no statutory guidance whatsoever on this issue, established its own guidelines which were later looked upon with approval by the Comptroller General. *See*, 46 Comp. Gen. 21, B-156287 (July 12, 1966). Based on these CSC guidelines alone—without any statutory indications explaining the nature or extent of the Government's interest—

travel and per diem expense payments for union negotiators were normally deemed to be within the discretion of the Government to make. *Id.*

Under the Reform Act, at 5 U.S.C. § 7105(a)(I), the CSC's role was implicitly transferred to the FLRA. The FLRA, with a basis far more clearly grounded in statute than the CSC ever had to act upon this question, reviewed its Labor Statute under its role established by Section 7105 and determined that Congress had expressly found in § 7101(a) that the right of employees "to bargain collectively, and participate through labor organizations . . . in decisions which affect them—(A) safeguards the public interest and (B) contributes to the effective conduct of public business." Further, Congress itself specifically declared that "collective bargaining in the civil service [is] in the public interest"; a public interest that, like the Government's interest as an employer, "demands the highest standards of employee performance . . . and the efficient accomplishment of the operations of the Government." *Id.*

Without question, it was reasonable, *far* from arbitrary, and well within the Authority's discretion to determine—on the basis of 5 U.S.C. § 7101(a), not on the basis of § 5702 (as the 2nd, 8th, and 11th Circuits erroneously opined)—that Congress had found collective bargaining to be a function that was in the interest of the Government and, as such, a compensable activity under Sections 5702 and 7131 of Title V for union and management negotiators alike.

Once the FLRA determined that Congress intended in the Statute for such bargaining activities to be the equivalent of official government business for union and management negotiators alike, Section 5702 applies to mandate the payment of all necessary travel expenses in the same ministerial manner as it does for all official government travel.

Consequently, the key issue is not what was intended when Section 5702 was enacted—but rather what did Congress intend when passing Section 7131, Section 7101, Section 7114 and Section 7116(a)(5) and (b)(5) of the Statute. On these issues the FLRA is plainly entitled to deference as the administrative agency with the responsibility for implementing the new law. *Power Reactor Development Co. v. Intern'l Union of Electrical, Radio and Machine Workers*, 367 U.S. 396 (1961); *Dept. of Defense v. FLRA*, *supra*; *National Federation of Federal Employees v. FLRA*, 652 F.2d 191 (D.C. Cir. 1981). Moreover, the FLRA was acting squarely within its expertise when it examined the Labor Statute and its legislative history in arriving at these determinations.

Thus, it would be error, we submit, for this Court not to accord deference to the FLRA's construction of the Federal Service Labor-Management Relations Statute. By substituting its judgment for that of the Authority and rejecting the Authority's decision based upon mere disagreement with its reasoning, the Court would clearly be applying the wrong standard of review in this case. It is significant, as Judge Heaney of the Eighth Circuit panel readily recognized in applying the correct standard of review in his dissent, that: "Nowhere is it shown, however, that the FLRA's decision violates any mandate or policy expressed in the enabling legislation." *Supra* at 1252, n.2.

Thus, in concluding in his dissent that it was incumbent upon the Court to defer to the judgment of the FLRA in this case under the standard for review set forth at 5 U.S.C. §§ 706 and 7123(c), Judge Heaney correctly reasoned as follows:

> **The FLRA relied upon the express policies and purposes of the Act and the agency's consistent interpretation of the Act as being intended to equalize the positions of labor and management, subject to various express restrictions. The agency thus ap-**

> proved travel payments because they further the equalization trend, further the express purposes of the Act, and are not barred by any statutory restriction. Such analysis may not be the only plausible interpretation, but it is a reasonable one and is well within the scope of the agency's authority . . .
>
> The contrary conclusion reached in this case is not required by the statute or its legislative history, which is conceded to be silent. It is not required by prior administrative practice, which is itself erratic and inconsistent. Moreover, it is not justified by the policy arguments relied upon by the majority, unless this Court is empowered to freely substitute its judgment for that of the agency. In my view, when Congress broadly empowers an independent agency to regulate federal labor relations, courts should not interfere with that agency's policy determination absent a clear showing that the decision is unreasonable, exceeds its authority, or is contrary to law. No such showing has been made here. *Id.*

In view of the above, in the case at bar it is clear that this Court should defer to the FLRA.

B. THE FLRA'S FINDING THAT FEDERAL SECTOR NEGOTIATIONS CONSTITUTE "OFFICIAL BUSINESS" IS REASONABLY DEFENSIBLE AND SHOULD BE AFFIRMED.

The FLRA, as affirmed by the Ninth Circuit, recognized that travel and per diem expenses are generally authorized for federal employees under 5 U.S.C. § 5701 *et seq.* when they are "engaged in official business for the Government." *FLRA Interpretation*, 2 FLRA No. 31, at 5. The FLRA then scrutinized both the language of, and purposes behind, its enabling statute, the Federal Service Labor-Management Relations Act (FSLMR) and determined that union negotiators *required by law* to engage in federal sector negotiations (5 U.S.C. § 7114) are in fact engaged in official business (or official

travel)[1] if compelled to travel in order to accomplish such negotiations.

In so ruling, the FLRA correctly reviewed the legislative history of 5 U.S.C. § 7131 [2] (official time) as well as Congress' clear declaration that federal sector bargaining is in the public interest and in the best interest of the Government in efficiency, effectiveness, productivity, and amicable dispute resolution. The FLRA first noted that adoption of the House bill in the area of official time represented a significant departure from the past federal sector labor relations program under Executive Order 11491. A significant aspect of the Statute which departed from the Executive Order is Congress' specific threshold finding and statement of purpose that labor organizations and collective bargaining are in the public interest and promote efficient government. 5 U.S.C. § 7101.[3]

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[1] The United States Code actually establishes the general principle that the government will pay the travel expenses of employees who are either traveling on "official business," *see* 5 U.S.C. §§ 5702, 5704 and 5707(b)(1), *or* for "official travel," *see* 5 U.S.C. § 5707(a), General Services Administration Travel Regulations § 1-1.2, FPMR temp. Reg. A-11, Supp. 4, Attachment A (April 28, 1977).

[2] Section 7131 requires or authorizes the granting of "official time" to employees in three situations. Section 7131(a) expressly requires official time for "negotiation of a collective bargaining agreement . . . including attendance at impasse proceedings[.]" 92 Stat. 1214. Section 7131(c) empowers the Authority to require official time for employees participating in its proceedings except for those covered by subsection (a). Section 7131(d) requires that agencies negotiate official time for representational and other matters not covered under the earlier subsections. (Section 7131(b) requires that internal union business be conducted during a non-duty status.)

[3] Section 7101(a) states:

§ 7101. Findings and purpose.

(a) The Congress finds that—

The Statute's statement of findings and purpose properly served as an important factor which the FLRA relied upon in concluding that the term "official time" in § 7131(a) includes an agency duty to pay necessary and related travel expenses. By explicitly endorsing and encouraging collective bargaining, and finding it in the public interest, Congress clearly evidenced its recognition that official time spent in bargaining is in the interest of the government and equivalent to official government business.

The findings and purpose stated in § 7101 of the Statute[4] are in sharp contrast to the preamble in Executive

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(1) experience in both private and public employment indicates that the Statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

(A) *safeguards the public interest*

(B) *contributes to the effective conduct of public business*, and

(C) *facilitates and encourages the amicable settlement of disputes* between employees and their employers involving conditions of employment; and

(2) The public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and *the efficient accomplishment of the operations of the Government.*

Therefore, labor organizations and collective bargaining in the civil service are in the public interest . . . [Emphasis added]

[4] The legislative history of 5 U.S.C. Section 7101 also reaffirms the import of its specific wording. The final language in Section 7101 came from the House version. The House Report described the meaning of Section 7101(a) this way:

Findings and purpose

Section 7101(a) sets forth the finding that collective bargaining in the Federal Service is in the public interest, in that

Order 11491, as amended. The Executive Order did not endorse collective bargaining. It did not find that labor organizations and collective bargaining are in the public interest. Nor did the Order specify that federal sector collective bargaining contributes to effective and efficient government. Congress unquestionably adopted the principle of collective bargaining in the Statute in a way never before recognized under the Order or in the private sector.

The FLRA reasonably construed § 7101 and § 7131(a) to indicate that official time spent by federal employees in collective bargaining is in the public interest and constitutes "official business for the government." *Interpretation and Guidance, supra* at 5. In this regard less than four months ago, the Supreme Court itself ruled that the "special responsibilities" and "special legal duties" of negotiating and administering a collective bargaining agreement and representing the interest of all employees in settling disputes and processing grievances, imposed by statute upon a public sector union, can indeed justify a finding that a public sector union is participating in the "official business" of the government. *Perry Education Association v. Perry Local Educators' Assn.*, 103 S.Ct. 948 (1983).

In *Perry* the Supreme Court ruled that the incumbent union representing Perry Township teachers could justify its access to the school mail facilities open only "to those who participate in the [school's] . . . official business." *Id.* at 959. The Court concluded that the union's access was in fact justified as "official business." *Id.* at 958, note 10. In the case at bar, in light of the clear context

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it safeguards employee rights and contributes to the effective conduct of public business by encouraging amicable resolution of employment-related disputes. Statutory protection of Federal employees' rights to organize and bargain collectively through labor organizations is in the public interest. H.R. Rep. No. 95-1403, 95th Congress 2d Sess. 38 (1978)

of the Reform Act (*e.g.*, §§ 7101, 7102(2), 7103(a)(9) and (12), 7106, 7113(c), 7114, 7116(a)(5) and (b)(5), 7131), there can be no doubt that federal unions should be deemed engaged in the official business of the government to an even greater degree than the public teachers' union in *Perry*, especially while participating in activities related to the legally imposed obligation [5 U.S.C. § 7121(a)] of negotiating collective bargaining agreements.

The Authority's reliance in its decision on 5 U.S.C. § 5701 *et seq.* was well placed in this regard. As previously stated, this portion of the United States Code establishes the general principle that the government will pay travel expenses to employees travelling on "official business," [5] *or* for "official travel." [6] Thus, as construed by the Comptroller General, travel expense reimbursement turns on whether or not the employee activity is in the interest of the government".[7]

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[5] *See* 5 U.S.C. § 5702, 5704 and 5707(b)(1).

[6] *See* 5 U.S.C. § 5707(a); General Services Administration Travel Regulations § 1-1.2, FPMR temp. Reg. A-11, Supp. 4, Attachment A (April 28, 1977).

[7] In its latest decision, B-156287 (June 15, 1981), the General Accounting Office (GAO) has held that its interpretations of the official time provisions of prior Executive orders have been superseded "to the extent of any conflict" with section 7131 of the Statute. In its decision B-156287 (CFR) (June 15, 1981) (attached hereto as Addendum E), GAO stated at 2:

> The enactment of Chapter 71, Title 5, as Title VII of the Civil Service Reform Act of 1978, Pub. Law No. 95-454, October 13, 1978 (92 Stat. 1111, 1192), provided a specific statutory provision—5 U.S.C. § 7131—for the use of official time in the labor-management area. This provision is more comprehensive and specific than the preexisting provisions of section 20 of Executive Order 11491, *supra*. In view of section 7135(b), providing for supersession of inconsistent provisions of the various Executive orders dealing with labor-management relations, we view section 20 of Executive Order 11491 as having been superseded by the specific provisions of section 7131 of Title 5, United

In its *Interpretation and Guidance, supra*, at 5, the FLRA correctly applied this standard as follows:

> . . . It is well established that such expenses are authorized when an employee 'is engaged on official business for the Government' (Chapter 57, Subchapter I—Travel and *Subsistence Expenses; Mileage Allowances*, 5 U.S.C. § 5701, *et seq.*). As already mentioned, Congress, in adopting the Statute, specifically found in section 7101(a) that collective bargaining 'contributes to the effective conduct of public business,' and that collective bargaining in the civil service [is] in the public interest.' Further, Congress expressly mandated in sections 7114 and 7116(a)(5) and (b)(5) that such negotiations be conducted in good faith by the parties involved (92 Stat. 1202, 1244). Thus, an employee, while negotiating a collective bargaining agreement as a union representative and while on paid time entitled to his or her usual compensation and not in a leave status, is clearly engaged on 'official business for the Government.'

In conclusion, the statutory grant of "official time" to bargain, and the § 7101 findings that collective bargaining is in the public interest clearly provide adequate basis for a finding that such negotiation time is in the best interests of the government.[8]

States Code. It follows, therefore, that our decisions interpreting the official time provisions of prior Executive orders have also been superseded by section 7131, to the extent of any conflict.

[8] As previously stated, the application of 5 U.S.C. § 5701 *et seq.* is purely ministerial in this case. The substantive finding that the activities herein constitute official business is based on the FLRA's analysis and interpretation of 5 U.S.C. § 7101 *et seq.*, and the proper exercise of its power to take any "actions as are necessary and appropriate to effectively administer the provisions of this chapter." 5 U.S.C. § 7105(a)(2)(I). Accordingly, the FLRA's finding is clearly entitled to deference as the Ninth Circuit ruled. *ATF, supra.*

C. OFFICIAL TIME STATUS AS PROVIDED IN 5 U.S.C. § 7131 IS ON DUTY STATUS AND THEREFORE INCLUDES PAYMENT OF NECESSARY TRAVEL AND PER DIEM EXPENSES.

It is most significant that if Congress had intended to place union negotiators in a special paid leave of absence status, it could easily have done so. Indeed, if a paid leave status had been intended, the term "leave" could have been specified as it was two pages later in the Act under the backpay revision in Section 5596(b)(1)(B), 92 Stat. 1216. On the other hand, in this regard the BATF relies primarily on one argument: Congress did not specifically say travel and per diem is an entitlement so Congress did not want these items provided for. This argument plainly fails, however, for the following reason: Since "official time" means "duty" status, there was clearly no need for Congress to further describe in detail any travel and per diem expenses as a requirement because they are automatically permitted for *any* on duty employee *who is required to accomplish his on-duty mission(s)*.

The FLRA ruling is fortified by the fact that agency management already treats federal employees who participate in collective bargaining on official time as if they are actually performing official government business. The official time which employees spend in collective bargaining is credited for accrual of annual leave, sick leave, reduction-in-force retention standing, and retirement.[9] Currently, while negotiating on official time, employees are correctly recognized as performing official government business in every respect except one—travel expenses. Petitioner has cited no Congressional intent anywhere in the Statute to justify this distinction. Indeed Congress clearly intended employee negotiators to

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[9] *See* Federal Personnel Manual Supplement 296-33, Subchapter 6, S6-1.5 Creditable Service; Federal Personnel Manual Supplement 831-1, Subchapter S 3-2.

be considered on "Paid time," the equivalent of official government business for all purposes.

In this regard, employees of the federal government are only authorized to be in one of three possible positions vis-a-vis their employer: (1) duty status; (2) off-duty; or (3) some form of paid or unpaid leave. The legislative development of the official time section demonstrates the constant dichotomy maintained by the House of Representatives between "official time" for various purposes on the one hand, and, on the other, the nonduty status required for conducting internal union business. Section 7131 of the Statute is identical to Section 7132 of H.R. 11280 as reported by the Committee on Post Office and Civil Service. All earlier versions of the section contained the contrasting provisions for "official time" and nonduty status. (See Section 7132 of H.R. 13, H.R. 9094, the Clay-Ford-Solarz Print Used for Markup, and H.R. 11280 as reported.)

So, too, rather than deciding to place union negotiators in some form of "paid leave" status as provided for in the Federal Personnel Manual at FPM Supplement 990-2, Subchapters S1-13, Congress expressly chose to place negotiators on official time. This decision by Congress to place union negotiators on official time—rather than opting to put them in a leave or nonduty status—establishes that such employees are in a duty status and are, therefore, entitled to travel and per diem expenses when the activities for which "official time" is authorized necessarily involve travel. Significantly, employees on official time continue to accrue their rights to all other forms of compensation and fringe benefits because they are in fact considered on duty and not on excused, or even paid, leave.

The FPM provides for numerous different forms of leave status. In its brief BATF has argued that union negotiators are no more entitled to travel and per diem payments than employees who, in the public interest,

participate in military funerals or vote. The analogy here drawn by the BATF is clearly wrong, however. The FPM provides that employees who participate in the above-described activities do so in an "excused absence" status and *not* in an official time/on-duty status. *See*, FPM Supp. 990-2, Subchapter 11. These activities are expressly authorized in Book 630 of FPM Supplement 990-2. Said Book is entitled "Absence and Leave" and does not include any activities performed on official time.

BATF mischaracterizes the FLRA reasoning by implying that the FLRA ruled that "paid time" always carries with it the right to travel expenses. The FLRA did not so rule. Instead the FLRA relied upon the statutory finding that collective bargaining is in the government's interest and merits "official time." Moreover, the examples cited by BATF do not involve "official time" under appropriate law or regulation but rather, as just stated, fall within a completely different status of leave called "excused absence." *See*, Federal Personnel Manual Chapter 630, Subchapter 11. Under the appropriate regulations, excused absences are permissible for various policy reasons, but *not* because such absence promotes the official business and interests of the government. Unlike "official time" to attend Impasse proceedings, etc., no federal statute certifies that blood donation constitutes the official business of the government. As such, excused absences cannot serve as precedent in the instant case.

BATF wrongfully insinuates that prior to the passage of the Reform Act travel and per diem payments by agencies to union negotiators were not made. This is simply not so. While travel expenditures were not expressly authorized under Executive Order 10988 (the Reform Act's predecessor), the Civil Service Commission (CSC) issued general guidelines under which the payment of travel expenses to employees serving as union representatives were entirely proper and authorized.

See, FPM Letter 711-5, August 1, 1966. The Comptroller General (CG), in turn, based on the CSC's submission of these proposed guidelines on June 24, 1966, *sua sponte* modified all its prior decisions denying travel and per diem. Significantly, the decisions so modified are the same decisions BATF relies upon in opposition to the FLRA's cogent determination that travel and per diem payments effectuate the purposes of the Statute.

In explaining his 1966 decisions to modify all prior CG opinions and sanction the CSC guidelines, Comptroller General Elmer B. Staats concluded:

> At the time our decisions B-156287, dated April 9, 1965, September 23, 1965, and January 28, 1966, which are referred to in your letter, were rendered there was neither a statutory provision, Executive Order, nor regulation or instruction of the Civil Service Commission prescribing standards or guidelines for determining when expenses of travel of employee organization representatives reasonably could be regarded as having been incurred primarily in the interest of the United States and, therefore, reimbursable from agency funds. The guidelines you now propose to issue in implementation of section 12 of the Executive Order establish necessary standards for a reasonable and uniform exercise of the discretionary administrative authority you consider essential to the fulfillment of the objective of employee-management cooperation as contemplated by Executive Order No. 10988. Therefore, otherwise proper payments of travel expenses of employee organization representatives that are made in accordance with those guidelines and supported by the required certification—and accompanying explanation —will not be questioned by our office in the absence of misrepresentation, bad faith, or arbitrary action in making the above prescribed certification. Our prior decisions in this area, cited above, are modified accordingly. CG Decision B-156287, 7/12/66.

Thus, the CG found the CSC guidelines proper and legal based only on the agency's discretionary determination that payment of travel expenses for union representatives was "essential to the fulfillment of the objective of employee-management cooperation as contemplated by Executive Order No. 10988." Significantly, the CSC guidelines gave great discretion to agencies in determining when such union representation activities could be considered "primarily in the interest of the Government" and payable. The CSC specifically found that travel expenses related to some labor relations activities should be paid for. These activities included joint labor-management cooperation committees and joint efforts concerning "prevention of accidents, reduction of absenteeism, improving communications, insuring equal employment opportunity, and maintaining employee productivity and morale." FPM Letter 711-5.

It is significant, if not controlling, that *all of the above "approved" topics are now negotiable matters under the expanded scope of bargaining permitted by the Reform Act, and therefore, are normally negotiated and addressed in collective bargaining agreements.* (Most contracts now include health and safety provisions, equal employment/affirmative action plans, progressive discipline provisions, counseling for employees who start to become unreliable, and various proposals such as flextime designed to improve employee morale and productivity.) Thus, even under the old CSC guidelines, most of the matters discussed in negotiations would be deemed primarily in the interest of the government because they naturally lead to increased production, improved morale, elimination of discrimination, a healthy and safe work environment, and the peaceful and timely resolution of disputes.

The CSC guidelines, drawn up during a time when most current subjects of bargaining were non-negotiable, still recognized that payment of travel expenses for em-

ployee representatives negotiating a labor agreement was permitted within the discretion of the employer agency. The CSC merely cautioned:

> As a general practice, travel expenses should not be paid to attend negotiation sessions for the purpose of negotiating an agreement . . . *the agency has the latitude to pay travel expenses* where the particular circumstances justify the payment. An agency, for example, may find that it would be in the primary interest of the Government . . . . FPM Letter 711-5. [Emphasis supplied]

On October 13, 1978, the Congress went one step further than the CSC and expanded the scope of bargaining to include all these matters previously deemed to be "primarily in the interest of the Government." In so doing, it further determined, expressly, that the right of employees to bargain collectively:

1. Safeguards the public interest. 5 U.S.C. § 7101 (a) (1) (A);
2. Contributes to the effective conduct of public business. *Id.* at (1) (B); and
3. The public interest demands the highest standards of employee performance and work practices to facilitate and improve the efficient operations of the Government. *Id.*, at (2).

In light of the above considerations, the Congress specifically found that: "Labor organizations and collective bargaining in the civil service are in the public interest." *Id.* Thus, on October 13, 1978, the Congress merely recognized and expanded upon the CSC's previous determinations set forth in FPM Letter 711-5 concerning the government's interest in labor-management relations. Based upon these express Congressional findings concerning the government's interest, the statute's provision on "official" time for negotiators, and its own responsibility to effectively administer the provisions of the Statute, the FLRA found that travel and per diem payments for negotiators already on official time was not only authorized but required.

Significantly, the CG and CSC determined that the CSC had the authority to authorize travel payments to employee organization representatives under "the Commission's responsibilities for giving guidance and technical advice to agencies under section 12 of the Order." FPM Letter 711-5. Likewise, without any doubt the FLRA, like the CSC before it, had the same authority under the Reform Act to issue its decision authorizing said payments under 7105(a)(1) which requires the Authority to establish "policies and guidance relating to matters under this chapter, and . . . be responsible for carrying out the purpose of this chapter."

D. THE FLRA'S DECISION ON OFFICIAL TIME EFFECTUATES THE PURPOSES OF THE STATUTE.

Reduced to its essence, BATF argues merely that the FLRA's decision will be expensive and, therefore, must be overturned. BATF Brief at 25-28. In truth, however, in view of all the circumstances involved, there is no evidence that the FLRA decision will cost any more money. Thus, as the FLRA has recognized in the past, under a system where consolidated negotiations at the single highest or national level are in the public interest and favored, *Veterans Administration*, 1 FLRA No. 55 (1979) and *Report on Labor Management Relations in the Federal Service* (1975), p. 35, it is necessary that the union's local representatives from all over the country appear. However, the centralized operations of the government allow most agencies to have all its master negotiators located at one location already (such as VA's central office in Washington, SSA's in Baltimore, and Justice's in Washington). Thus, assuming *arguendo* that travel and per diem for union negotiators were not authorized by this Court, the union—having to bear the entire travel burden—would be fully within its rights to insist, for example, that VA negotiations be held in a geographically centralized location, equally burdensome to both sides, such as Kansas City or Chicago. Thus, practically speaking, the VA would be required to spend just as much, or

more, money sending all its management people and resources from Washington to Chicago as it would in bringing just the union negotiators to Washington. In view of the above, common sense alone dictates that BATF's cost argument is a verbal "shell game" and the FLRA was not "clearly in error" in determining, based upon its unique experience, that travel and per diem expenses were consistent with the purposes of the Statute when the realities of the situation were fully considered. The FLRA appropriately determined that "the payment of travel and per diem expenses would not only more nearly equate the status of union and management negotiators as contemplated by Congress, but would also facilitate more effective union representation at the bargaining table, thereby implementing the purpose of the Statute, as reflected in Section 7101(a), to encourage collective bargaining in the Federal sector." FLRA *Interpretation*, *supra* at p. 6.

The Congress recognized, in § 7101(b), the "special requirements and needs of the Government" in enacting the system set forth in the CSRA. In addition to finding that bargaining was primarily or ultimately in the public interest, the Congress further evinced a desire for a balanced or equalized system with neither side being capable of exerting undue pressures upon the other. [124 Cong. Rec. H. 9633 (daily ed., Sept. 13, 1978), Comments of Rep. Udall concerning his compromise which subsequently passed in the House.] In this connection too, Rep. Clay, in discussing the proscription of official time for employees engaged in internal union business under Section 7132(b) of the House Bill (which was enacted as Section 7131(b) of the Statute) stated as follows: [10]

> Section 7132(b) of the Udall compromise bars the use of official time for conducting the internal business of a labor organization . . . . Activities that involve labor-management contacts are not included in this section . . . . Title VII imposes heavy respon-

[10] 124 Cong. Rec. H 9, 638 (daily ed. Sept. 13, 1968).

> sibilities on labor organizations and on agency management. These organizations should be allowed official time to carry out their statutory representational activities *just as* management uses official time to carry out its responsibilities. [Emphasis added]

Significantly, as the FLRA found, "Additionally, it is not controverted that management representatives are uniformly paid travel expenses and per diem when engaged in the negotiation of a collective bargaining agreement on behalf of management, and Congress indicated its intent that similar prerogatives be accorded employees . . . ." *Interpretation* at p. 6.

Contrary to BATF's arguments, without the right to strike and, particularly, without the right to negotiate union security provisions, labor organizations in the federal sector are clearly at a severe disadvantage when confronted by abusive or hostile federal managers intent on "breaking" the union by extending negotiations and requiring heavy out-of-pocket expenditures by unions. In effect, management had no incentive to come to any agreements under the Executive Order. A fundamental concern reflected in the legislative history and in the Statute itself, equalizing the bargaining power of agencies and employee representatives, requires that management no longer be able to exert economic pressure at the table by protracting ngotiations. Prolonged negotiations and other abuse of the Executive Order's provisions were discussed during hearings on the various versions of the Statute in the 95th Congress. This abuse led first the House of Representatives and then the Conference Committee to reject (the Senate's) language explicitly based on Section 20 of the Executive Order with its limitations on official time and its consequent "tilting" of economic pressure in favor of management. Thus, when the overall picture is viewed accurately, BATF's slanted outcries of poverty and injustices are unwarranted and unrealistic. In fact, the FLRA's decision below perpetuates, promotes, and fosters

the intricately balanced system created by the Congress and actually helps avoid the severe pressures and restrictions BATF says concern it. Congress' rejection of Senate Bill § 7232 and its subsequent silence since the FLRA's decision on travel and per diem in O-PS-3 and 6 logically lead to the conclusion that Congress, having expressed no disapproval of the FLRA decision herein under scrutiny, experiences no such disagreement.

Despite BATF's broad arguments contra, the Court also should be keenly aware that the travel expense rules in the private sector are truly irrelevant in the case at bar and simply have no bearing on the FLRA's decision. The federal and private sectors are radically different. If Congress intended to treat federal employees like private sector employees it merely would have amended the NLRA to include the Federal government. Instead Congress enacted a substantially different, comprehensive labor relations scheme, unique to the needs of the Federal government. One dramatic difference relevant to the issue of official time, travel, and per diem concerns the scope of federal bargaining.

Thus, under the CSRA: salaries, performance standards, seniority, retirement, insurance, vacation time, sick leave, pensions, and holidays are all *non-negotiable*. It is crucial for our purposes that the Court understand that collective bargaining in the federal sector is largely confined to negotiating matters of mutually beneficial interest to management, labor, and the public, such as provisions promoting: arbitration, health and safety, affirmative action/equal employment, alcohol and drug rehabilitation, merit promotion, progressive discipline, whistleblower protections, retaliation-free personnel action, etc. "Management rights," a negotiable matter in the private sector, is explicitly protected in Section 7106 of the Reform Act. Strikes and work stoppages are also strictly prohibited. 5 U.S.C. Section 7116(b)(7); *PATCO v. FLRA*, No. 81-2135 (D.C. Cir. June 11, 1982).

Moreover, unlike the private sector where companies campaign intensely against unionization, the Statute requires that Federal agencies remain *neutral* in union elections.[11] It is illegal for a Federal agency to oppose unionization. Hence, when BATF refers continually to the private sector practice of rarely compelling a private employer to pay the "bargaining costs of its adversaries," it flagrantly ignores the special rules in the Federal government whereby unions are not viewed in the same "adversarial" light as in the private sector.

Another such vital distinction concerns union dues. In the private sector unions may negotiate a "union shop" or "agency shop" system whereby all employees must pay dues. 29 U.S.C. Section 158(a)(3). Such systems are illegal in the Federal government where there is an "open shop" and employees have a protected right *not* to join the union (5 U.S.C. Section 7102). The federal union is, therefore, legally obligated to represent members and non-members alike, yet without agency shop or even "service fee" arrangements, only members need contribute any money. At the same time, however, unlike private sector unions that have well-defined fair representation obligations, *see Archer v. Airline Pilots Assn.*, 102 LRRM 2827 (9th Cir. 1979), Federal sector unions' representation duties are arguably boundless.

Grievances in the Federal sector are themselves defined as any contractual complaint *and* "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment." 5 U.S.C. § 7103(a)(9)(c). Moreover, despite the severe financial limitations already noted, federal unions are obligated to represent employees *outside* the grievance process and handle statutory appeals if the nonpaying, nonmember so

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[11] See *Dept. of the Air Force, Air Force Plant Representative Office Detachment 27, Fort Worth, Tx., and NFFE Local 1958 and AFGE Local 1361*, 5 FLRA No. 62 (4/17/81) for a detailed discussion of the background and legislative history of this unique federal sector rule.

requests. § 7121(e)(1). In a recent case, the FLRA has gone so far as to prosecute a union for breach of the duty of fair representation because the union charged non-members a nominal fee to join as plaintiff in a civil lawsuit—separate and apart from any grievance—brought by the union under its Legal Rights Fund (which is funded solely by its members). *AFGE and Social Security Administration*, 3-CO-2003 (case pending).

In view of the above, it is apparent that it is simply not reasonable to compare private and federal sector negotiation schemes in determining whether federal union negotiators are entitled to travel and per diem expenses necessarily incurred in fulfilling their bargaining obligations imposed by the Reform Act. Federal unions are clearly participating in the "official business" of the government while negotiating and administering bargaining agreements (*see* §§ 7101, 7114, 7121, 7131). [*Supra* at Argument B]. In addition, when viewed in a practical, real world sense, the BATF has actually not established that paying union negotiators' travel and per diem is one whit more expensive than the only other alternative—transporting and maintaining the Agency's negotiators and resources at an equally burdensome neutral site outside of the Agency's Central Office.

CONCLUSION

For the aforesaid reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
PETITIONER,

v.

FEDERAL LABOR RELATIONS AUTHORITY, ET AL.,
RESPONDENTS

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF NATIONAL FEDERATION OF FEDERAL EMPLOYEES IN SUPPORT OF RESPONDENTS

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No. 82-799

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BRIEF AMICUS CURIAE OF NATIONAL FEDERATION OF FEDERAL EMPLOYEES IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

The National Federation of Federal Employees (NFFE) is a labor organization as defined in 5 U.S.C. §7103(a)(4) which represents approximately 150,000 federal employees throughout the United States and abroad. NFFE is presently comprised of approximately 500 affiliated locals. Collective bargaining rights are accorded to

NFFE local unions, or in some instances to a council made up of a number of local unions, in accordance with 5 U.S.C. §7111.

NFFE is a party to a case involving the same issue as that presented here. The case is pending in the United States Court of Appeals for the District of Columbia Circuit, United States Environmental Protection Agency v. Federal Labor Relations Authority, Civ. No. 82-2396 (D.C. Cir., filed Nov. 22, 1982), and it has been stayed pending this Court's disposition of the case at bar.

We have a substantial interest in the resolution of the question presented for review. The entitlement of union negotiators to receive payment for travel and per diem expenses incurred while on official time in the negotiation of a collective bargaining agreement is of fundamental importance to the federal

labor relations program. A decision by this Court to overturn the court below would represent a severe blow to our ability to carry out our responsibilities on behalf of the employees in NFFE bargaining units. Accordingly, NFFE supports the position of respondents in this case.

SUMMARY OF ARGUMENT

In enacting the Civil Service Reform Act of 1978, Congress established the Federal Labor Relations Authority as the administrative agency charged with the interpretation of the statute and with the adjudication of disputes arising under it. Because interpretation of the statute is a primary responsibility of the Authority, and because the Authority has expertise in the federal labor relations program enabling it to render such interpretations, the Authority's Interpretation in this case is entitled to deference.

Legislative history of the official time provision of the statute shows that Congress knew of the restrictive policies in effect under the Executive Order labor relations program, and that it explicitly rejected those policies and struck a new balance between labor and management,

designed to put the unions on a more equal footing with management in collective bargaining. The Authority's Interpretation promotes this Congressional determination.

The FLRA has not improperly infringed upon a matter consigned to the General Services Administration. The FLRA's determination is based upon its reading of 5 U.S.C. §7131, a part of its enabling statute, and is not dependent upon analysis of 5 U.S.C. §5702. Moreover, GSA is an employing agency in the federal labor relations program and therefore is not in a position to make a neutral determination on the entitlement of union negotiators to travel and per diem payments. Other provisions of the labor relations statute suggest that Congress envisioned occasional need for the Authority to rule on matters which concerned issuances of other agencies, and that it empowered the FLRA,

as the neutral agency in the federal program, to make those rulings.

The Authority's Interpretation effectuates other purposes of the Federal Service Labor-Management Relations Statute. Specifically, it provides some incentive for management to come to the bargaining table with a sincere interest in reaching agreement, an incentive which was sorely lacking prior to the enactment of the Civil Service Reform Act. The nature of collective bargaining, as well as certain statutory provisions, already place an unequal pressure on unions to reach agreement in negotiations. Allocation of responsibility for travel and per diem payments to agency management helps to equalize the burdens on the parties, consistent with Congressional intent.

Finally, the Authority's policy favoring consolidation of smaller bargaining units into larger units would be

frustrated by a ruling overturning the Authority's Interpretation, since federal unions would lack the funds to participate in consolidated bargaining. This lack of funds would also place unions in a position where they could be unable to meet their statutory duty of fair representation owed to bargaining unit employees. Such a result would frustrate the purposes of the Civil Service Reform Act.

ARGUMENT

I. INTERPRETATIONS OF THE FEDERAL LABOR RELATIONS AUTHORITY ARE ENTITLED TO DEFERENCE FROM THE COURTS.

A. It is the Proper Role of the Federal Labor Relations Authority to Resolve Major Policy Issues Pertaining to Federal Labor Relations.

The statutory provision at issue is this case, 5 U.S.C. §7131, is only one part of an extensive statutory program for federal labor relations. Title VII of the Act governs labor-management relations and collective bargaining for the majority of federal agencies. Executive Order No. 10988, 3 C.F.R. 521 (1959-1963 Compilation), and subsequent orders which previously governed the federal sector labor

relations program, were effectively repealed. 1/ The Act comprehensively reorganized the structure of federal labor-management relations. Congress established the new system to protect the right of employees to bargain collectively and to encourage the development of practices which would lead to greater governmental efficiency. See 5 U.S.C. §7101. The Federal Labor Relations Authority (FLRA) was created by the legislation and replaced its predecessor the Federal Labor Relations Council (FLRC). The FLRC had been composed of three ex-officio

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1/ The original Executive Order labor relations program was revised and continued by Executive Order No. 11491, 3 C.F.R. 861 (1966 - 1970 Compilation) as amended by Executive Orders Nos. 11616, 11636 and 11838, 3 C.F.R. 605, 634 (1971 - 1975 Compilation) and 3 C.P.R. 957 (1971 - 1975 Compilation).

members, the Director of the Office of Management and Budget, the Secretary of Labor, and the Chairman of the Civil Service Commission. Due in part to criticism of the management composition of the FLRC, Congress created the FLRA in its present neutral form. 2/

The FLRA was established to develop and administer policies under the Act and in general to perform in the federal sector a function akin to that of the National Labor Relations Board, which oversees

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2/ Message from the President Transmitting Proposal to Reform the Federal Personnel Management System Through Reorganization Plan No. 2 of 1978, H.R. Doc. No. 95-341, 95th Cong., 2d Sess., 2 (1978), reprinted in Subcomm. on Postal Personnel and Modernization of the Comm. on Post Office and Civil Service, 96th Cong. 1st Sess., Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978, at 630, 632 (Comm. Print No. 96-7) [hereinafter cited as "Legis. Hist."]; H.R. Rep. No. 95-1396, 95th Cong., 2d Sess., 3, 7 (1978), Legis. Hist. at 659, 661, 665.

labor-management relations in the private sector. 3/ Congress also empowered the FLRA to take actions necessary and appropriate to effectively administer its responsibilities. 5 U.S.C. (Supp. V.) §7105.

In furtherance of its responsibilities under 5 U.S.C. §7105 (a)(1) to "provide leadership in establishing policies and guidance relating to matters under this chapter [and to] be responsible for carrying out the purpose of this chapter", the FLRA has issued several "Interpretation and Guidance" determinations. At issue here is the FLRA determination on the question whether employees representing

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3/ See 29 U.S.C. §151 et seq. (1976). This analogy between the FLRA and the NLRB has been explicitly accepted by the courts. See, e.g., Turgeon v. FLRA, 677 F. 2d. 937, 939 (D.C. Cir. 1982)(per curiam); Department of Defense v. FLRA, 659 F. 2d 1140, note 8 at 1144 (D.C. Cir. 1981), cert. denied sub nom. AFGE v. FLRA, 455 U.S. 945 (1982).

a union and engaged in negotiations on official time are entitled to travel and per diem expenses from their agencies. NFFE submitted comments supporting the conclusion that such an entitlement exists. The FLRA considered all comments, reviewed the Act's legislative history, and issued its Interpretation and Guidance at 2 FLRA 265 (1979). The U.S. Court of Appeals for the Ninth Circuit reviewed that decision and properly sustained it.

Judicial review of Authority orders is governed by 5 U.S.C. §706. The FLRA's ruling is to be set aside only if "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. §706(2)(A). See Department of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981). The Ninth Circuit correctly determined that the Authority's decision is reasoned and justifiable.

The FLRA's decision is based upon its analysis of 5 U.S.C. (Supp. V) §7131(a) which authorizes official time for union negotiators engaged in collective bargaining. In its analysis, the FLRA examined applicable legislative history in order to discern Congressional intent on this point. Official time practices under the Executive Order program had been restrictive. While agency managers received official time for all hours spent in negotiations, their union counterparts received at best "half time". This meant that no more than one half of the time spent by employees on behalf of the union could be paid by the agency; for the rest, employees were required to use their annual leave (vacation) time, or go without compensation for half their hours. Alternatively, union negotiators could be granted a maximum of 40 hours official

time. Executive Order 11491, 3 C.F.R. 861 (1966-1970 compilation), Section 20. Since agency managers could spend as much time at the table as they pleased, the restrictions on union official time prevented the union from entering into negotiations with management as equals.

The official time restrictions were significantly altered by the enactment of Section 7131. Under the Act, Section 7131(a) mandates that an agency grant official time to an employee representing a labor organization during collective bargaining negotiations when an employee would otherwise be in a duty status.

Based upon its review of the language of the Act and legislative history, the FLRA concluded that Congress explicitly intended to make a significant departure from the Executive Order program. The Authority stated that the official time

provision of the statute was enacted in order to allow "effective union representation comparable to the representation of management." Interpretation, 2 FLRA 265, 268 (1979).

The enactment of Section 7131, making official time automatic, was a direct reversal of Section 20 of the Executive Order, which severely limited official time. Relying upon the statute's explicit endorsement of collective bargaining, and recognizing that Section 7131 represented a complete reversal of prior policy, the Authority reasonably concluded that employees on official time were entitled to the benefits they would normally receive while on duty, including travel and per diem expenses. Such expenses are paid to government employees when "engaged on official business for the Government." 5 U.S.C. §5701 et seq. Accordingly, the Authority concluded that union negotiators

on official time are engaged in official business and entitled to travel and per diem expenses. In doing so, the Authority was construing the legislative intent of Section 7131, not the intent of Section 5702. Section 5702 is simply the general authorization for disbursement of travel expenses; it is the interpretation of Section 7131 controls the entitlement of union negotiators to such expenses.

Interpretation of the Federal Service Labor-Management Relations Statute, 5 U.S.C. §§7101 et seq., is the Authority's primary responsibility. 5 U.S.C. §7105. In this area the Authority is clearly entitled to the deference accorded to an administrative agency with expertise in matters arising under its enabling statute. Department of Defense v. FLRA, 659 F.2d 1140 (D.C. Cir. 1981).

B. The Authority's Interpretation Does Not Infringe on a Matter Consigned By Statute to the General Services Administration.

The FLRA's Interpretation does not infringe upon the authority of the General Services Administation to issue regulations and to administer the statutory provisions for travel and per diem expenses under 5 U.S.C. §5702. As noted above, the FLRA's Interpretation is based upon an analysis of Section 7131 on official time and the necessary implications of that section, and not on the meaning of Section 5702. Nonetheless, the Government argues that the Authority's Interpretation is not entitled to any deference because it makes reference to Section 5702, a provision which is not part of the Authority's enabling statute. Such a reading of the law would unduly restrict the Authority's ability to carry out its responsibilities

in the Administration of the federal labor relations program.

The General Services Administration is not in a position to make a determination regarding the entitlement of union negotiators to travel and per diem expenses while on official time under Section 7131. GSA is not a neutral agency in the labor relations program. On the contrary, it is an employing agency under the provisons of 5 U.S.C. §7103 (a)(3) of the Federal Service Labor-Management Relations Statute. As such, it engages in collective bargaining negotiations with labor organizations certified to represent GSA employees under that Statute. As an employing agency, GSA has an interest in holding down negotiating costs, including travel and per diem expenses. Inevitably this fact would color GSA's judgment on whether the law authorized expenses for union negotiators. GSA thus would have an

inherent conflict of interest in the consideration of this issue.

Congress created the FLRA as a neutral body to resolve issues between labor and management. The authority granted to the FLRA by statute indicates that Congress intended for the FLRA to resolve issues which might involve the interpretation of issuances by other agencies. For example, the Authority is charged with ruling on questions of negotiability of union bargaining proposals. 5 U.S.C. §7105(a)(2)(E). Part of the process of deciding whether a matter is negotiable involves a determination whether the proposal is covered by a Government-wide rule or regulation, in which case it would not be negotiable. 5 U.S.C. §7117 (a)(1). Of necessity, this means the FLRA must interpret the meaning of any Government-wide rule or regulation asserted by management to bar negotiations. In doing

so, the FLRA must review issuances of other agencies. Congress clearly accorded the FLRA the right to make these determinations.

Congressional recognition that the FLRA's role in reviewing Government-wide regulations would entail interpretation of those regulations is supported by the statute and its legislative history. The statute explicitly allows the Authority to request, at its option, advisory opinions from the Director of the Office of Personnel Management (OPM) on regulations or other policy directives promulgated by that Office. 5 U.S.C. §7105(i). In the Senate version of Title VII which was reported to the Conference Committee, the FLRA was to be granted the power to request advisory opinions from the Director of OPM, and the Director was granted an automatic right to intervene in any FLRA proceeding. S. 2640, §7204(h), in

Legislative History at 569. The intervention provision was deleted by the Conference Committee and does not appear in the statute as enacted. Thus the FLRA was clearly given the primary role, consistent with Congress' determination to create a neutral body to make determinations on federal labor relations policy matters.

Deletion of the Senate provision shows that Congress knew that the FLRA would need to make interpretations of rules sponsored by other agencies, and intended that the FLRA, rather than another agency, undertake this task. The Authority is expected to use its special understanding of the federal personnel system to accomplish its statutory mandate.

The Authority has been charged with the obligation to provide leadership in labor relations matters. 5 U.S.C. §7105(a). Its role is that of an arbiter

between unions and employing agencies. As a neutral body, the FLRA does not have an interest in the question of whether federal employees are entitled to travel and per diem expenses in accordance with 5 U.S.C. §5702 when bargaining on official time under 5 U.S.C. §7131. It is consistent with the explicit authority delegated to the FLRA, as well as with the statutory purpose underlying Title VII, for the FLRA to make the determination whether an employee granted official time to engage in collective bargaining is also entitled to receive travel and per diem payments from the employing agency.

Even though the FLRA's power to rule on the scope of the duty to bargain allows it to strike compromises which may force one agency into potential conflict with another agency, these judgments have been reserved to the Authority by statute. See Library of Congress v. FLRA, 699 F.2d

1280 (D.C. Cir. 1983). A finding that the FLRA lacks this power would undermine the careful balance that Congress struck when it created the FLRA. Such a decision would encourage a host of agencies, such as the Office of Personnel Management, the Office of Management and Budget, the Federal Emergency Management Agency, the Department of Labor, and others responsible for issuance of Government-wide rules or regulations, to challenge the FLRA's decisions on labor-management areas which impinge on their own regulations as an impermissible infringement of their domain. Such a result would directly conflict with the Authority's role as created by Congress.

II. THE INTERPRETATION OF THE FEDERAL LABOR RELATIONS AUTHORITY PROMOTES EFFECTIVE COLLECTIVE BARGAINING.

A. The Authority's Interpretation Effectuates the Purposes of the Federal Service Labor-Management Relations Act.

Congress has determined that the statutory protection of the right of federal employees to bargain collectively safeguards the public interest and contributes to the effective conduct of public business. 5 U.S.C.§7101(a).

The collective bargaining agreement is the keystone of any labor-management relationship. It defines the rights and obligations of the parties to the agreement and sets forth the benefits and protections applicable to the employees in that bargaining unit. Negotiation of the collective bargaining agreement is of utmost importance to the union.

If the federal labor relations program is to function as Congress intended,

there must be an incentive for both labor and management to reach agreement on a contract. In the private sector the primary incentive for management to negotiate in good faith with the union is the threat of a union strike or work slowdown. Such actions are prohibited under the Civil Service Reform Act. 5 U.S.C. §7103(a)(4)(D); 7116(b)(7). No comparable pressures exist in the federal sector, creating an inherent imbalance. Congress recognized this inequity when it adopted Section 7131(a), granting the union's negotiators the same amount of official time as management's negotiators. A narrow interpretation of Section 7131, granting the union only the equivalent number of hours of time as management but denying employees representing the union the travel and per diem payments accorded to management representatives, would leave

the situation in acute imbalance. The union would be under pressure to conclude negotiations, in order to minimize unreimbursed travel and per diem expenses. Management negotiators could easily take advantage of this by stalling negotiations.

The Government argues that it would be unduly onerous to require the agency to shoulder the expenses of both the agency's and the employees' negotiators, and that such a rule would undercut any incentive for the union's negotiators to reach agreement. In fact, the Government simply wishes to preserve the management advantage which persisted throughout the Executive Order labor relations program. It is an argument the Government lost when the Congress repudiated the official time practices of the Executive Order program and decided to put the parties on an equal

footing. 4/

Certain pressures are in place to encourage both parties to reach agreement. In addition to the mutual requirement to negotiate in good faith, 5 U.S.C. §7117, the law also defines it as an unfair labor practice for either party to fail or refuse to negotiate in good faith. 5 U.S.C. §7116(a)(5), (b)(5).

There is, however, substantially greater pressure on a union to conclude a collective bargaining agreement than there

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4/ The Government's argument that agencies would be unable to control or monitor union expenses, or that it would be improper for them to do so, is misplaced. The duty to bargain in good faith pursuant to 5 U.S.C. §7117 extends to the negotiation of so-called "groundrules" for negotiations. Groundrules cover such matter as the location of negotiation sessions, their length and frequency, and necessary travel arrangements. See, e.g., Dept. of the Army, Army Field Artillery Center, Fort Sill, OK and Local 273, NFFE 69 FSIP 75 (Feb. 20, 1980); Oklahoma Air National Guard and Local 1694, NFFE, 80 FSIP 43 (Oct. 8, 1980). Procedures to monitor or control union expenses can be negotiated.

is on agency management. This pressure comes from at least four sources. First, it is the union which seeks to negotiate protections and benefits for unit employees, while management seeks to preserve its ability to act without the need to abide by procedural safeguards or other negotiated protections. Obviously, no benefits or protections sought by the union will go into effect until the contract is signed and approved in accordance with 5 U.S.C. §7114(c). This simple fact is the primary incentive for the union to reach agreement on a collective bargaining contract.

Second, once a union is certified as the collective bargaining representative of a unit of employees, the statutory interest in promoting stability of labor relationships protects the incumbent union from challenge by a rival organization for only a limited amount of time. In the

case of a newly certified union, the so-called "certification bar" will last for only one year. 5 U.S.C. §7117(f)(4). If the union has not concluded an agreement with agency management by that time, it is vulnerable to challenge by another organization which would seek to displace it, as well as to a challenge by agency management itself asserting that the union no longer represents a majority of eligible employees in the unit.

Third, the union has a statutory duty to represent all employees in the bargaining unit fairly. 5 U.S.C. §7114. Failure to adhere to its responsibility to provide fair representation is an unfair labor practice under Section 7116(b). This fact adds additional pressure on the union which is not present for management.

The fourth unique pressure on the union derives from the Act's prohibition

of an "agency shop". Under the federal labor relations program, no employee may be required to join a union or pay dues, even though the union has the obligation to fairly represent all employees in the bargaining unit. 5 U.S.C. §7102. The legislative history of the Act makes it clear that Congress did not intend to authorize agency shop arrangements, and the Federal Labor Relations Authority has so concluded. Conference Report, H.R. Rep. No. 95-1717, 95th Cong., 2d Sess. 159 (1978), reprinted in Legis. Hist. 827; Service Employees International Union, AFL-CIO, Local 556 and Department of the Army Support Command, 1 FLRA 563 (1979). As a result, the union must work hard to "sell" the benefits of union membership to employees in the bargaining unit, since the union's funds come only from the membership dues of those who choose to join it. The union has no product to sell if it is unable to conclude a collective

bargaining agreement providing benefits and protections for its members. New members cannot be persuaded to join, and current members become disaffected as time wears on without a collective bargaining agreement. Accordingly, the pressure to reach a final agreement is considerable.

Agency management, on the other hand, is in a much stronger position if the union does not have a contract. Without a contract, the union's position as exclusive bargaining agent becomes subject to challenge; the employer can continue to act without regard to any negotiated protections for employees; employees may be expected to become disillusioned with union representation and to withdraw support; and the agency may be able to create a situation where it will not have to deal with the union at all. Federal agencies very much want to have such an advantage. Yet Congress enunciated its intent very

clearly, and the Authority properly relied upon that intent:

> Title VII imposes heavy responsibilities on labor organizations and on agency management. These organizations should be allowed official time to carry out their statutory representational activities just as management uses official time to carry out its responsibilities. FLRA Interpretation and Guidance, 2 FLRA 265 (1979), citing 124 Cong. Rec. H9638 (daily ed. Sep. 13, 1978), emphasis in FLRA Interpretation.

The Authority's Interpretation requiring the agencies to pay travel and per diem expenses for union negotiators on official time pursuant to 5 U.S.C. §7131 helps to effectuate the intent of Congress in enacting that provision: to place union and management on a more equal footing at the bargaining table. The union has many incentives to reach agreement on a collective bargaining contract; without a requirement for the agency to pay expenses, there are virtually no effective pressures on the agency's negotiators. Requiring agencies to pay travel and per

diem expenses for both management and union negotiators will encourage agencies who are concerned about the costs to reach agreement. Congress plainly intended to create some incentives to encourage agencies to reach agreement and to relieve unions of costs which they shouldered under Executive Order 11491. Congress sought to create a more balanced system. The Authority's interpretation comports with the purposes of the Act.

B. FLRA Policy in Other Areas Would Be Undermined by a Reversal of the FLRA Interpretation.

The Federal Labor Relations Authority has adopted a policy of facilitating the consolidation of units. Pursuant to 5 U.S.C. §7112(d), the Authority may consolidate two or more existing bargaining units within a particular agency into a single larger bargaining unit. Such consolidation can facilitate collective dealings and provide more efficient use of the parties' resources by eliminating the need to negotiate a proliferation of separate collective bargaining agreements at the local level. Once a consolidated unit is certified, it replaces the smaller pre-existing units as the exclusive representative of all the employees included in those units. As a result, a single master agreement is negotiated to cover all employees within the consolidated unit.

The Authority's policy favoring unit consolidations was first expressed in Veterans Administration, Washington, D.C. and American Federation of Government Employees, AFL-CIO, 1 FLRA 458 (1979), a case in which the Authority approved the consolidation of 236 units within the Veterans Administration which were represented by constituent locals of the union. In approving the consolidation, the Authority recited the history of the policy as it had developed under the Executive Order.

> In 1975 Executive Order 11491 was amended by Executive Order 11838 to establish a policy which would facilitate the consolidation of existing exclusive bargaining units. In its Report and Recommendations which accompanied the issuance of Executive Order 11838, the Federal

> Labor Relations Council emphasized that "the creation of more comprehensive units is a necessary evolutionary step in the development of a program which meets the needs of the parties in the Federal labor-management relations program and best serves the public interest." The Report further stated that a "consolidated unit . . . must still conform to the appropriate unit criteria contained in the Order" and that "[i]n making his determination on the appropriateness of [a] proposed consolidated unit, the Assistant Secretary should be mindful of the policy of facilitating the consolidation of existing bargaining units." [footnote omitted] 1 FLRA 458, 462.

The Authority has continued this policy in subsequent cases under Title VII. See Army and Air Force Exchange Service, Dallas and American Federation of Government Employees, AFL-CIO, 5 FLRA No. 90 (May 22, 1981).

The policy favoring unit consolidation would be undermined by a decision denying travel and per diem payments to union negotiators. When multiple com-

ponents of a large bargaining unit are scattered around the country, employees representing the union in collective bargaining necessarily must travel to the negotiation site. Travel and per diem expenses will be incurred. If the agencies are relieved of the obligation to pay these costs, the union will be unable to send representatives to participate in collective bargaining.

Reducing the number of agreements which must be negotiated reduces the amount of hours which agency representatives spend in negotiations, thus promoting government efficiency. This savings must be balanced against the cost of travel and per diem payments.

The differing practice in the private sector is not relevant to the federal program, for the relationship of the parties in the private sector is entirely

different. As noted supra at 30, federal unions may not negotiate an agency shop provision. Unions in the private sector are in a far better position to underwrite their own negotiation expenses since they have a source of revenues, forbidden to federal unions, which can substantially defray those costs. Congress struck a different balance in the federal program. Consequently, a reversal of the Authority's interpretation would have an adverse impact on other policy areas within the FLRA's province.

C. Travel and Per Diem Payments are Necessary to Enable the Union to Meet its Duty of Fair Representation.

The union has an obligation under 5 U.S.C. §7114 to fairly represent all employees in the bargaining unit. That duty encompasses the duty to take into account the interests of all segments of the bargaining unit in the negotiation of a collective bargaining agreement. Humphrey v. Moore, 375 U.S. 335 (1964). The union's duty of fair representation has been explicitly recognized in the federal labor relations program and has been found to be enforceable in court. Karahalios v. Defense Language Institute, 534 F.Supp. 1202 (N.D. Calif. 1982).

If federal unions are denied travel and per diem payments for negotiations,

they will be placed in a position where they will be unable to meet their obligation to fairly represent the interests of the members of their bargaining units. This situation will result from the inability to pay for the expenses that would be incurred if they sought to carry out their responsibilities in good faith. Since federal unions cannot seek dues allotments from all those whose interests are represented, their sources of funds are severely limited. Congress intended to preclude agency shop arrangements, but Congress also intended to establish a program which more nearly equalizes the positions of union and management and which protects the right of employees to bargain collectively. The FLRA correctly interpreted the balance of interests which Congress sought to establish and gave effect to that balance in its Interpretation.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit, affirming the Authority's rulings on payment of travel and per diem expenses, should be affirmed. The Authority's determination is reasoned and justifiable. It implements Congressional intent, and it fosters the balance between labor and management that was established by Congress.

Respectfully submitted,

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IN THE

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BUREAU OF ALCOHOL, TOBACCO AND FIREARMS,
Petitioner,

v.

FEDERAL LABOR RELATIONS AUTHORITY, *et al.*,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

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BRIEF *AMICUS CURIAE* OF PUBLIC SERVICE RESEARCH COUNCIL

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BRIEF *AMICUS CURIAE* OF PUBLIC SERVICE RESEARCH COUNCIL

INTRODUCTION

Pursuant to Rule 36.3 of the Rules of this Court, Public Service Research Council submits this brief *amicus curiae* in support of Petitioner Bureau of Alcohol, Tobacco and Firearms (BATF). All parties to this case have consented to the filing of this brief.[1]

[1] The Council has filed with the Clerk of this Court letters from counsel for the parties pertaining to its request to participate as *amicus curiae*.

INTEREST OF THE *AMICUS CURIAE*

Public Service Research Council is an independent national association of some 900,000 scholars, commentators, legislators, and private citizens from all walks of life united by a common concern for the maintenance of effective constitutional government. The Council engages in non-partisan research and education regarding, among other things, the character and operation of collective bargaining in public employment, and its effects on governmental institutions and the provision of public services at the local, state, and national levels.

The Council has developed considerable expertise concerning the philosophical, political, social, legal, economic, and practical aspects of public-sector unionism and collective bargaining.[2] On numerous occasions, it has provided this and other Courts with its views in briefs *amicus curiae*.[3]

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[2] For example, the Council's sister-organization, the Public Service Research Foundation, regularly publishes scholarly articles on these subjects in the *Government Union Review: A Quarterly Journal on Public Sector Labor Relations*.

[3] Perry Educ. Ass'n v. Perry Local Educators' Ass'n, No. 81-896 (U.S. Sup. Ct.); National League of Cities v. Usery, No. 74-878 (U.S. Sup. Ct.); City of Madison, Joint School Dist. No. 8 v. WERC, No. 75-946 (U.S. Sup. Ct.); Jackson Transit Authority v. Local Division 1285, Transit Union, No. 81-411 (U.S. Sup. Ct.); PATCO v. United States, No. 81-542 (U.S. Sup. Ct.); Virginia v. Arlington County Bd. of Supervisors, No. 18747 (Va. Ct. App.); Pacific Legal Foundation v. Brown, 3 Civil No. 18364 (Cal. Ct. App.); United States v. PATCO, Civil Action No. 81-1805 (D. D.C.); United States v. PATCO, Civil Action No. 81-0763A (E.D. Va.); Air Transport Ass'n of America v. PATCO, No. 70-C-400 (E.D.N.Y.).

In the instant case, the Council believes that the parties may not fully present to this Court what the Council sees as the central issue: namely, that participation by a union in public-sector bargaining can never be part of the "official business" of government. For that reason, the Council files this brief *amicus curiae*.

SUMMARY OF THE ARGUMENT

The decision of the Court of Appeals for the Ninth Circuit that participation in collective bargaining by a union of civil-service employees is "official business" of the national government flies in the face of generally recognized principles of public-sector collective bargaining, of Congress' refusal to define such bargaining as "official business" of the government, and of the unequivocal language of the very statute on which the Court of Appeals relies.

ARGUMENT

The real issue in this case is not whether Congress' assertion that "labor organizations and collective bargaining in the civil service are in the public interest"[4] is true or false.[5] Hardly any question in contemporary employment-relations is more controversial than the effects of public-employee unionism on the general welfare from the perspective of political economics, political science, and constitutional law. Notwithstand-

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[4] 5 U.S.C. § 7101(a) (1976).

[5] *Pace* the contrary assumption of the Court of Appeals. Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority, 672 F.2d 732, 738 (9th Cir. 1982).

ing initially widespread support from politically influential public-sector unions, legislators, and self-interested academics;[6] and despite the existence of numerous collective-bargaining laws applicable to employees of local, state, and national government; today, "[i]ntellectually, [public-sector bargaining] is already dead".[7] Increasingly, both theoretical and empirical investigations in political economics document the impracticality of public-sector bargaining as a procedure for allocating scarce public revenues among competing governmental services.[8] Analyses in political science describe the corporative-state nature of such bargaining,[9] and its inconsistency with the fundamental conceptions of governmental and popular sovereignty.[10] And studies in constitutional law disclose

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[6] *See* Lieberman, "Academic Bias in Public Sector Labor Relations", *Gov't Union Rev.*, Vol. 3, No. 4 (Fall 1982), at 3.

[7] Lieberman, "Teacher Bargaining: An Autopsy", *The Kappan* (Dec. 1981), at 231, 232.

[8] *E.g.*, R. S. Summers, *Collective Bargaining and Public Benefit Conferral: A Jurisprudential Critique* (N.Y. State School of Indus. & Lab. Rel'ns, Inst. of Pub. Employment, Monograph No. 7, Nov. 1976); M. Lieberman, *Public-Sector Bargaining: A Policy Reappraisal* (1980); *idem*, "The Costs of Collective Bargaining in the Modesto City School Districts: A Case Study", *Gov't Union Rev.*, Vol. 2, No. 1 (Winter 1981), at 3.

[9] Vieira, "Compulsory Public Sector Collective Bargaining: The Trojan Horse of Corporativism", *Gov't Union Rev.*, Vol. 2, No. 1 (Winter 1981), at 56. *See also* P. Bradley, *Constitutional Limits to Union Power* (1976).

[10] *E.g.*, Petro, "Sovereignty and Compulsory Public-Sector Bargaining", 10 *Wake Forest L. Rev.* 25 (1974); *idem*, "Public-Sector Bargaining: An Assessment", *Gov't Union Rev.*, Vol. 3, No. 1 (Winter 1982), at 3; *idem*, "Compulsory Public Sector Bargaining and Arbitration in the Courts", *Gov't Union Rev.*, Vol. 3,

the repugnance of compulsory unionism among public employees to basic guarantees of individual liberty.[11]

Arguably, Congress recognized the myriad problems collective bargaining for employees of the national government poses when it declared its "purpose * * * to establish procedures * * * designed to meet the special requirements and needs of the Government", and when it premonished the courts to "interpre[t]" these procedures "in a manner consistent with the requirement of an effective and efficient Government".[12] And, therefore, its statement that "labor organizations and collective bargaining in the civil service are in the public interest "[13] sanctions only such bargaining as actually consists with "the requirement of an effective and efficient Government", rather than broadly endorsing whatever special privileges unions

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No. 3 (Summer 1982), at 3; Summers, "Public Sector Collective Bargaining Substantially Diminishes Democracy", *Gov't Union Rev.*, Vol. 1, No. 1 (Winter 1980), at 1; E. Vieira, Jr., *"To Break and Control the Violence of Faction": The Danger to Representative Government from Compulsory Public-Sector Collective Bargaining* (1980).

[11] Vieira, "Of Syndicalism, Slavery and the Thirteenth Amendment: The Unconstitutionality of 'Exclusive Representation' in Public-Sector Employment", 12 *Wake Forest L. Rev.* 515 (1976); *idem*, "Are Public-Sector Unions Special Interest Political Parties?", 27 *DePaul L. Rev.* 293 (1978); *idem*, "Exclusive Representation *versus* Freedom of Petition for Nonunion Public Employees — A Study in Irreconcilable Constitutional Conflict", 1977 *Det. C. L. Rev.* 499; *idem*, "Constitutional Limitations on the Assessment of Agency Fees in Public Sector Employment", *Gov't Union Rev.*, Vol. 3, No. 4 (Fall 1982), at 31.

[12] 5 U.S.C. § 7101(b) (1976).

[13] 5 U.S.C. § 7101(a) (1976).

of civil-service employees may demand, and Respondent Federal Labor Relations Authority (FLRA) may grant, in the name of "collective bargaining".

For that reason, if this case turned on whether the FLRA's interpretation of the law is valid because the agency's notion of what "collective bargaining" in the civil service requires accurately reflects the public interest, on whether that interpretation satisfies "the requirement of an effective and efficient Government," or on whether (in the ultimate analysis) labor organizations and collective bargaining can co-exist with that requirement at all, this Court would have to determine for itself, independently of any congressional declaration, what constitutes "the public interest" regarding collective bargaining in civil-service employment [14]—and therefore would have to confront serious questions of statutory and constitutional law that lack any substantial predicate of facts in the record,[15] and are not appropriate for

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[14] On the one hand, this Court may disregard the congressional statement that "labor organizations and collective bargaining • • • are in the public interest" as a *finding of political-economic fact*, because at best it constitutes mere conjecture as to the general future effect of the employment-relations procedure Congress established. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 538 (1935). On the other hand, this Court may also disregard that statement as a *conclusion of constitutional law*, because no such legislative declaration as to what constitutes the public interest, welfare, or necessity can preclude judicial review of the issue. *E.g.*, Block v. Hirsh, 256 U.S. 135, 154 (1921); Tyson & Brother v. Banton, 273 U.S. 418, 431 (1927).

[15] A complete factual record, of course, if the *sine qua non* of constitutional adjudication. *E.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 236-37 (opinion of Stewart, J.), 244 n. (opinion of Stevens, J.) (1977).

decision on the basis of judicially noticeable knowledge.[16] This case, however, turns on an issue far narrower than the antagonism of the FLRA's interpretation of the law to the public interest in effective and efficient government: namely, whether participation by Respondent National Treasury Employees Union (NTEU) in collective bargaining with the BATF is "official business" under the law providing for payment of *per diem* expenses for persons engaged in such business.[17] And this question the Court can answer dispositively in the negative simply on the basis of: (i) its general knowledge of public-sector collective bargaining; (ii) Congress' refusal to define such bargaining as part of the "official business" of the government; and (iii) the unambiguous language of the very statute on which the FLRA relies.[18]

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[16] In light of the searching criticisms of public-sector bargaining outlined heretofore, pp. 3-5 & nn.6-11, the presumption against judicial notice is particularly apt. *See* Brown v. Piper, 91 U.S. 37, 42-43 (1875). Certainly, the consistency of such bargaining with the public interest is not "capable of • • • instant and unquestionable demonstration". Application of Knapp-Monarch Co., 296 F.2d 230, 232 (Ct. Cust. & Pat. App. 1961). Neither are the peculiar political-economic and political-scientific facts on which that issue depends for resolution so determinate or notorious as to obviate reliance on the usual forms of evidence. *See, e.g.*, Ohio Bell Telephone Co. v. Public Util. Comm'n, 301 U.S. 292, 300-02 (1937); Borden's Farm Prods. Co., Inc. v. Baldwin, 293 U.S. 194, 207-11 (1934).

[17] 5 U.S.C. § 5702(a) (1976).

[18] 5 U.S.C. § 7131 (1976).

I. By its very nature, participation by the National Treasury Employees Union in collective bargaining with the Bureau of Alcohol, Tobacco and Firearms is not "official business" of the national government.

Whether or not participation in collective bargaining by negotiators representing the BATF is "official business" of the government, such participation by representatives of the NTEU (or any other public-employee union) is not, for two reasons relating to the very nature of public-sector bargaining.

First, the NTEU is indisputably a private organization, not an agency of the national government; and the persons who represent it in collective bargaining with the BATF are merely private citizens, not public officials. Indeed, the applicable statute denies the very status of "labor organization" to any "organization sponsored by an agency"[19]—implying that, far from rendering the NTEU a part of the government, its privilege to participate at all in collective bargaining depends upon the union's strict separation from any public agency. Moreover, although the NTEU's members who negotiate on its behalf are public employees, they are not thereby public officials, too. After all, the distinction between public employment and public office is fundamental: Public employment involves only the fulfillment of *contractual* duties of a public nature; whereas, in addition to the essential characteristics of tenure, duration, emolument, and duties fixed by law,[20] public office involves

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[19] 5 U.S.C. § 7103(a)(4)(C) (1976).

[20] *E.g.*, Metcalf & Eddy v. Mitchell, 269 U.S. 514, 519-20 (1926); United States v. Hartwell, 73 U.S. (6 Wall.) 385, 393 (1868).

an exercise of some part of the sovereign power of the government.[21] And if the mere participation in collective bargaining with the BATF infused the representatives of the NTEU with the prerogatives of public officials, then the statute authorizing such bargaining would raise the most serious problems of unconstitutional delegation of public authority to private parties.[22]

Second, the relationship between the BATF and the NTEU in collective bargaining is *adversarial,* negating the notion that both parties are pursuing the same interests, or acting in the same capacity vis-a-vis the public. The contemporary process of compulsory collective bargaining is the embodiment in statute form of the philosophy of trade unionism.[23] And that philosophy posits the existence of a permanent struggle between employers and organized employees, in which the central role of unions is to compel employers to grant ever-increasing economic concessions to wage-earners.[24] Thus, the structure and regulation of collective bargaining rests on the assumption that "[t]he

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[21] *E.g.*, Yaselli v. Goff, 12 F.2d 396, 403-04 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927); Chapman v. Gerard, 341 F. Supp. 1170, 1173-74 (D.V.I. 1970); *aff'd*, 456 F.2d 577 (3d Cir. 1972); Caine v. United States, 73 F. Supp. 1019, 1021 (N.D. Ill. 1947); Wetzel v. McNutt, 4 F. Supp. 233, 234 (S.D. Ind. 1933).

[22] *Compare* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935), *with* the authorities cited *ante*, note 10.

[23] *E.g.*, NLRB v. American Nat'l Ins. Co., 343 U.S. 395, 408 (1952) (National Labor Relations Act); Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 346 (1944) (Railway Labor Act).

[24] *E.g.*, S. Perlman, *A Theory of the Labor Movement* (1928).

parties * * * proceed from contrary and to an extent antagonistic viewpoints and concepts of self-interest".[25]

Specifically in the public sector, collective-bargaining laws assume: (i) that terms and conditions of employment public officials "unilaterally" set are necessarily "unfavorable" or "unfair" to public employees; (ii) that public employers and their employees are separated by differences in outlook, motivation, goals, and values that cannot be resolved except through a formal process of compulsory negotiation;[26] and (iii) that therefore government should encourage the monopolistic organization of its employes in unions, and grant those unions special political powers and privileges to influence, control, or even override the normal political process.[27] Indeed, the whole thrust of public-sector collective bargaining is directed at "redistributing [political] power" from governmental officials to unions representing public employees.[28]

Yet, if governmental officials concededly engage in "official business" when they bargain collectively with representatives of public employees; and if those representatives are the officials' *adversaries* in such bar-

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[25] NLRB v. Insurance Agents, 361 U.S. 477, 488 (1960).

[26] *E.g.*, Love & Sulzner, "Political Implications of Public Employee Bargaining", 11 *Ind. Rel.* 18, 25 (1972).

[27] *E.g.*, Summers, "Public Employee Bargaining: A Political Perspective", 83 *Yale L.J.* 1156 (1974).

[28] R. S. Summers, *ante* note 8, at 3. *Accord, e.g.*, Summers, "Public Sector Bargaining: Problems of Governmental Decision Making", 44 *Cinn. L. Rev.* 669, 674 (1975). *See also* Abood v. Detroit Bd. of Educ., 431 U.S. 209, 228-29 (1977) (opinion of Stewart, J.).

gaining, and "proceed from *contrary* and * * * *antagonistic* viewpoints and concepts of self-interest; then the representatives cannot themselves be engaged in "official business"—unless one accepts the self-evidently incoherent premiss that the government has identical interests in the pursuit of two mutually contradictory collective-bargaining goals.

II. Congress has never defined collective bargaining by civil-service unions as part of the "official business" of the national government.

Contrary to the implication of the Court of Appeals,[29] Congress has never declared that a civil-service union's participation in collective bargaining is part of the "official business" of the government. In the applicable statute, Congress asserted that collective bargaining "contributes to the effective conduct of public business"[30]—but it did not state that such bargaining on the part of employee-representatives *is* "public business", in fact or in law. Self-evidently, many diverse private activities "contribute to the effective conduct of public business". Indeed, no modern state without totalitarian power—and certainly no government of a free society—could function efficiently without pervasive cooperative interaction with private citizens, corporations, and associations. However, no one could reasonably argue that these private activities necessarily *become* "public business" simply because they *contribute to* it, any more than a private taxpayer becomes a public functionary through his mere subsidization of public expenditures.

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[29] 672 F.2d at 737-38.

[30] 5 U.S.C. § 7101(a)(1)(B) (1976).

III. The statutory authorization of "official time" for representatives of civil-service employees engaged in collective bargaining does not render their participation in such bargaining "official business" of the national government.

As sustained by the Court of Appeals, the crux of the FLRA's position is that, "if [NTEU] negotiators are on official time [within 5 U.S.C. § 7131(a)], they should be interpreted to be on official government business within the meaning of 5 U.S.C. § 5702(a)".[21] This view rests on an obvious misreading of section 7131.

First, the FLRA's interpretation begs the question of what possible purpose Congress could have had in following the tortuously indirect route of defining participation in collective bargaining by "[a]ny employee representing an exclusive representative" as "official business" within section 5702(a) by "authoriz[ing] official time for such purposes"—instead of simply declaring in section 7131(a) that "[a]ny employee representing an exclusive representative * * * shall be deemed to be in a duty status".

Second, the FLRA's interpretation neglects to take into account the clear differentiation section 7131(a) makes between collective bargaining and an employee's "duty status". Obviously, Congress believed that an employee is *not* in a "duty status" when "representing an exclusive representative in the negotiation of a collective bargaining agreement". So, in so far as "duty status" is another term for "official business", section 7131(a) itself establishes that participation in collective bargaining by employee-representatives is not "official business".

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[21] 672 F.2d at 737.

Third, the FLRA's interpretation glosses over what section 7131(a) actually declares: namely, that employees are "*authorized* official time" for collective-bargaining purposes, not that they are "*on* official time". The statute thus operates as a narrow exception from the unstated general rule that participation in collective bargaining does not entitle the participant to "official time" or any emolument of office. The "authoriz[ation of] official time" constitutes merely a shorthand for a specific set of benefits that Congress deemed appropriate to confer on employee-negotiators *who otherwise would have had no reasonable claim to them, because of the unofficial nature of their activities.* However, Congress having specified these benefits with the inclusive designation "official time", neither the FLRA nor the Court of Appeals had any authority to expand the list of benefits in order to "equaliz[e]" the positions of the BATF and NTEU "with regard to collective bargaining".[22]

Fourth, the FLRA's interpretation of section 7131 (a) conflicts with the unequivocal statement in section 7131(b) that the "collection of dues" is part of "the internal business of a labor organization", and "shall be performed during the time the employee is in a non-duty status." No one disputes that a major purpose for the "collection of dues" by a union engaged in collective bargaining is to defray the various expenses of its bargaining-representatives. If the FLRA's view is correct, on the one hand Congress has indirectly arranged through sections 7131(a) and 5702(a) for the *public* subsidization of some of the NTEU's collective-bargaining expenses, while on the

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[22] *Contrast id.* at 738 *with* United States v. Zazove, 334 U.S. 602, 616-17 (1948).

other hand it has directly stated in section 7131(b) that collection of monies for such subsidization is "the *internal* business of a labor organization". Similarly, if the FLRA's view is correct, on the one hand Congress had indirectly established in section 7131(a) that participation of employee-representatives in collective bargaining is "official business" of the government, while on the other hand it has directly stated in section 7131(b) that the "collection of dues" by their organization is *not* "official business" but rather "the internal business" of the organization—even though (supposedly) through the interaction of sections 7131(a) and 5702(a) Congress has also provided for the public to pay the employee-representatives' *per diem* expenses as a part of the government's "official business", with the effect that this payment obviates *pro tanto* the necessity for any "collection of dues"!

Obviously, the FLRA's interpretation renders section 7131 internally self-contradictory and ridiculous, and must be rejected on that ground alone.

CONCLUSION

This Court should reverse the decision of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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3 March 1983

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to Rule 28 of the Rules of this Court, I have served three (3) copies of the attached Brief *Amicus Curiae* of Public Service Research Council on each of the following persons, by depositing said copies in a United States post office, first-class postage prepaid, addressed as indicated below:

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Done this 3d day of March, 1983.

No. 82-799-CFX
Status: GRANTED

Title: Bureau of Alcohol, Tobacco and Firearms, Petitioner
v.
Federal Labor Relations Authority, et al.

Docketed:
November 10, 1982

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Svartz, Steven H., Tobias, Robert M.

Entry	Date	Note	Proceedings and Orders
1	Sep 30 1982		Application for extension of time to file petition and order granting same until November 10, 1982 (Rehnquist, October 1, 1982).
2	Nov 10 1982	G	Petition for writ of certiorari filed.
3	Nov 10 1982		Record filed.
4	Dec 13 1982		Memorandum of respondent Federal Labor Relations Authority filed.
6	Dec 13 1982		Order extending time to file response to petition until December 23, 1982.
7	Dec 22 1982		Brief of respondent Natl. Treas. Employees Union in opposition filed.
8	Dec 22 1982		DISTRIBUTED. January 14, 1983
9	Jan 17 1983		Petition GRANTED.
			**********
10	Feb 5 1983	G	Motion of the parties to dispense with printing the joint appendix filed.
11	Feb 7 1983		DISTRIBUTED. February 18, 1983. (Motion to dispense with printing the joint appendix)
12	Feb 22 1983		Motion of the parties to dispense with printing the joint appendix GRANTED.
14	Feb 23 1983		Order extending time to file brief of petitioner on the merits until April 2, 1983.
17	Mar 3 1983		Brief amicus curiae of Public Service Research Coun. filed.
13	Mar 8 1983		Record filed.
19	Mar 8 1983		Certified original record & C.A. proceedings received.
20	Apr 5 1983		Brief of petitioner filed.
21	Apr 20 1983	D	Motion of respondent National Treasury Employees Union for divided argument filed.
22	May 2 1983		Opposition of respondent Federal Labor Relations Authority to motion of respondent National Treasury Employees Union for divided argument filed.
24	May 3 1983		Order extending time to file brief of respondent on the merits until June 6, 1983.
25	May 16 1983		Motion of respondent National Treasury Employees Union for divided argument DENIED.
26	Jun 2 1983		Brief amicus curiae of [illegible] Assn. of Govt. Employees, AFL-CIO filed.
27	Jun 6 1983		Brief amicus curiae of Natl. Federation of Fed. Employees filed.
28	Jun 6 1983		Brief of respondent Fed. Labor Relations Auth. filed.
29	Jun 6 1983		Brief of respondent Natl. Treas. Employees Union filed.
30	Jul 8 1983		CIRCULATED.
31	Aug 15 1983		SET FOR ARGUMENT, Tuesday, October 11, 1983. (4th case)
32	Sep 21 1983	R	Reply brief of petitioner Bur. of Alc., Tob., & Firearms filed.
	Oct 11 1983		ARGUED.